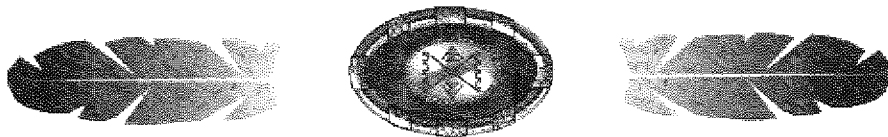


***EPA POLICY***  
***ON***  
***CONSULTATION AND COORDINATION***  
***WITH***  
***INDIAN TRIBES***

*May 4, 2011*



## **I. Policy Statement**

EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this Policy, the continuing dialogue between EPA and tribal governments, and program and regional office consultation procedures and plans.

This Policy establishes national guidelines and institutional controls for consultation across EPA. EPA program and regional offices have the primary responsibility for consulting with tribes. All program and regional office consultation plans and practices must be in accord with this Policy. This Policy seeks to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability and allowing for, and encouraging, the tailoring of consultation approaches to reflect the circumstances of each consultation situation and to accommodate the preferences of tribal governments. The consultation process is further detailed in Section V of this document.

### III. Definitions

A. “Indian tribe” or “tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a.

B. “Tribal official” means an elected, appointed, or designated official or employee of a tribe.

C. “Indian country” means:

1. All land within limits of any Indian reservation<sup>1</sup> under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

2. All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

3. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

### IV. Guiding Principles

To understand both the purpose and scope of the Policy as well as the integration of the Policy, Memorandum, and Executive Order, it is helpful to list principles found in EPA’s January 2010 *Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175*:

EPA’s fundamental objective in carrying out its responsibilities in Indian country is to protect human health and the environment.

EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s land and membership, and not as political subdivisions of states or other governmental units.

EPA recognizes the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law.

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<sup>1</sup> EPA’s definition of “reservation” encompasses both formal reservations and “informal” reservations, i.e., trust lands set aside for Indian tribes. *See for example* Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993); 56 Fed. Reg. 64876, 64881 (1991); or 63 Fed. Reg. 7254, 7258 (1998).

*Notification should occur sufficiently early in the process to allow for meaningful input by the tribe(s).*

3. **Input Phase:** Tribes provide input to EPA on the consultation matter. This phase may include a range of interactions including written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved. EPA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. During this phase, EPA considers the input regarding the activity in question. EPA may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.

4. **Follow-up Phase:** EPA provides feedback to the tribes(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.

## **B. *What Activities May Involve Consultation?***

1. **General Categories of Activities Appropriate for Consultation:** The broad scope of consultation contemplated by this Policy creates a large number of actions that *may* be appropriate for consultation.

The following list of EPA activity categories provides a general framework from which to begin the determination of whether any particular action or decision is appropriate for consultation. The final decision on consultation is normally made after examining the complexity of the activity, its implications for tribes, time and/or resource constraints, an initial identification of the potentially affected tribe(s), application of the mechanisms for identifying matters for consultation, described below, and interaction with tribal partnership groups and tribal governments.

The following, non-exclusive list of EPA activity categories are normally appropriate for consultation if they may affect a tribe(s):

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments<sup>2</sup>
- Permits

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<sup>2</sup> Legislative comments are a special case where, due to short legislative timeframes, consultation in advance of comment submission may not always be possible. Nevertheless, EPA will strive to inform tribes when it submits legislative comments on activities that may affect Indian country or other tribal governmental interests.



**C. *When Consultation Occurs.*** Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.

**D. *How Consultation Occurs.*** There is no single formula for what constitutes appropriate consultation, and the analysis, planning, and implementation of consultation should consider all aspects of the action under consideration. In the case of national rulemaking, a series of meetings in geographically diverse areas may be appropriate. For more routine operational matters, a less formal process may be sufficient.

## **VI. Managing the Consultation Process**

### **A. Roles and Responsibilities**

The following roles and responsibilities have been defined to allow EPA to effectively implement this Policy. These roles and responsibilities reflect the fact that, while oversight and coordination of consultation occurs at EPA headquarters, as a practical matter, much of the actual consultation activity occurs in EPA's program and regional offices. The responsibility for initially analyzing the need for consultation and then subsequently carrying it out, resides with these offices.

**1. Designated Consultation Official:** In addition to being the EPA's National Program Manager for the EPA Tribal Program, EPA's Assistant Administrator for the Office of International and Tribal Affairs (OITA) is the EPA-Designated Consultation Official under the Executive Order. These responsibilities include coordination and implementation of tribal consultation in accordance with this Policy and Agency compliance with the 1984 Indian Policy.

The Designated Consultation Official has the authority for: (1) defining EPA actions appropriate for consultation, (2) evaluating the adequacy of that consultation, and (3) ensuring that EPA program and regional office consultation practices are consistent with this Policy.

Per the Memorandum, the Designated Consultation Official reports annually to OMB on the implementation of the Executive Order.<sup>5</sup> Further, the Designated Consultation Official certifies compliance with the Executive Order for applicable EPA activities. The American Indian Environmental Office (AIEO) is located within OITA and coordinates the operational details of the Policy and compiles consultation-related information for the Designated Consultation Official.

**2. Assistant Administrators:** Assistant Administrators oversee the consultation process in their respective offices including analysis for potential

<sup>5</sup> Report is filed annually by August 3<sup>rd</sup>.

# EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights

## Introduction

EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so. The purpose of this Guidance is to enhance EPA's consultations under the *EPA Policy on Consultation and Coordination with Indian Tribes* in situations where tribal treaty rights may be affected by a proposed EPA action. Specifically, this Guidance provides assistance on consultation with respect to EPA decisions focused on specific geographic areas when tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas.<sup>1</sup> In these instances, during consultation with federally recognized tribes (tribes), EPA will seek information and recommendations on tribal treaty rights in accordance with this Guidance. EPA will subsequently consider all relevant information obtained to help ensure that EPA's actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.<sup>2</sup>

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes.<sup>3</sup> As the Supreme Court has explained, treaties should be construed liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent. We note that this Guidance does not create any new legal obligations for EPA or expand the authorities granted by EPA's underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.

## Determining When to Ask About Treaty Rights During Tribal Consultation

EPA consultation with tribes provides the opportunity to ask whether a proposed EPA action that is focused on a specific geographic location may affect treaty-protected rights. Because treaty rights analyses are complex, staff are expected to inquire early about treaty rights.

Certain types of EPA actions, namely those that are focused on a specific geographic area, are more likely than others to have potential implications for treaty-protected natural resources. For example, EPA review of tribal or state water quality standards as a basis for National Pollutant Discharge Elimination System permits typically focuses on a specific water body. If a treaty

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<sup>1</sup> This Guidance focuses on consultation in the context of treaties. EPA recognizes, however, that there are similar tribal rights in other sources of law such as federal statutes (e.g., congressionally enacted Indian land claim settlements).

<sup>2</sup> EPA Administrator, December 1, 2014 Memorandum, Commemorating the 30th Anniversary of the EPA Indian Policy.

<sup>3</sup> *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172 (1999).

asked and the answers are understood. For any treaty rights discussion raised during consultation, the tribe may identify particular tribal officials to consult with EPA about treaty rights. It is important that EPA work to ensure that consultation occurs with the appropriate tribally identified officials.

(1) Do treaties exist within a specific geographic area?

This question is designed to help EPA determine when a treaty and its related resources exist within the specific geographic area of the proposed action. This question is important because tribes may possess treaty rights both inside and outside the boundaries of reservations. In some cases, EPA may already be aware of existing, relevant resource-based treaty rights in a specific geographic area; for example, when a tribe has treaty rights within the boundaries of its reservation or near its reservation. In other cases, EPA may not be aware of the full effects of the treaty rights, or EPA may find it difficult to determine when a specific geographic area has an associated treaty right. For example, some tribes in the Great Lakes area retain hunting, fishing, and gathering rights both in areas within their reservations and in areas outside their reservation boundaries, commonly referred to as ceded territories. Similarly, some tribes in the Pacific Northwest retain the right to fish in their “usual and accustomed” fishing grounds and stations both within and outside their reservation boundaries, and retained the right to hunt and gather throughout their traditional territories.

(2) What treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?

This question is designed to help EPA understand the type of treaty rights that a tribe may retain. By asking this question, EPA can better understand the complexities that are often involved in treaty rights and better understand whether the proposed EPA action could affect those rights. Some treaties explicitly state the protected rights and resources. For example, a treaty may reserve or protect the right to “hunt,” “fish,” or “gather” a particular animal or plant in specific areas. Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish, or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.

(3) How are treaty rights potentially affected by the proposed action?

This question is designed to help EPA understand how a treaty right may be affected by the proposed action. EPA should explain the proposed action, provide any appropriate technical information that is available, and solicit input about any resource-based treaty rights. It is also appropriate to ask the tribe for any recommendations for EPA to consider to ensure a treaty right is protected.

## Tribal Ceded Territories in Region 5

Briefing Material for Mary A. Gade, Regional Administrator

Prepared by: Indian Environmental Office  
Office of Regional Counsel

### 1.0 BACKGROUND

#### 1.1 What are ceded territories?

Generally, ceded territories are lands transferred from tribes to the federal government by treaty. These lands are outside the boundaries of federally recognized Indian reservations. While tribes no longer hold title to these lands, in many cases they do retain *usufructuary rights* within ceded territories. These *usufructuary rights* may include rights to hunt, fish, harvest traditional food, and gather medicinal plants.

#### 1.2 How were ceded territories in Region 5 established?

A series of treaties (1836, 1837, 1842, and 1854) transferred large tracts of land in Michigan, Wisconsin, and Minnesota from tribes to the federal government (see map). These treaties established reservations and defined ceded territory. The tribes that signed these treaties reserved *usufructuary rights* in these ceded territories and the federal government has a general duty to protect those rights as discussed below in Section 2.0. The federal courts have affirmed tribal hunting, fishing and gathering rights in a number of decisions, most importantly in Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) and Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7<sup>th</sup> Cir. 1983).

#### 1.3 How are ceded territories different from reservations?

Reservation land is part of *Indian country*, generally defined under federal law as: (1) all lands within the borders of federally recognized Indian reservations irrespective of whether such land is held in fee by non-members; (2) allotted lands held by individual tribal members or by a tribe; and (3) dependent Indian communities (see 18 U.S.C. 1151). In some cases, there also exist tribal trust lands outside the borders of a reservation on behalf of specific tribes – these “trust parcels” are also *Indian country*. EPA has jurisdiction to implement federal environmental programs in *Indian country*, including lands owned by non-tribal members inside reservation boundaries. EPA has the authority to delegate some authorities to tribes for program implementation in *Indian country*. EPA also has jurisdiction over trust parcels outside reservation borders.

Ceded territories are not part of *Indian country*. State program authorities, including state implementation of delegated/authorized/approved federal programs, apply outside of *Indian country*, including in ceded territories. EPA, of course, retains federal program authorities that are not delegated to a state. EPA also retains oversight authority for programs delegated to a state and can exercise that authority as appropriate where state implementation of a federal program may impact reserved tribal rights.

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 Attorney Work Product  
 Pre-Decisional  
 ORC:blw

## Tribal Treaty Rights in Region 5 - Overview

September 28, 2015

**BACKGROUND:** The 35 federally recognized tribes in Region 5 have a long and complex history of treaty-making with the United States. While Sioux, Potawatomi, Iroquois, and Winnebago tribes have come to be located in the Region 5 states of Wisconsin, Minnesota, Michigan (and soon Indiana), it is the Ojibwe/Chippewa Bands, whose homelands have historically been in this region, which hold reserved rights to hunt, fish, and gather within certain land cessions. Some of these treaty designated resources, including fish, wild rice, wetland plants, waterfowl, fur-bearers and medicinal plants, are water dependent. Some are susceptible to atmospheric deposition of pollutants, including especially mercury. Some are particularly impacted by climate change, such as moose. All Region 5 states have federally approved air, water, waste, and other environmental program authorities; in addition, Michigan is one of two states nationally to have a federally approved CWA 404 permitting program. Tribes with reserved treaty rights have made frequent requests to R5 through various avenues such as the Regional Tribal Operations Committee, the R5 Tribal Caucus, the R5 Tribal Environmental Program Management Conference and the WQS program for consideration of treaty rights protection in federal and state environmental regulatory decision making.

**CURRENT STATUS:** Following issuance of EPA's May of 2011 consultation guidance, Region 5 developed its own policy on consultation, and in addition, some Region 5 program offices, including Water Division, have developed standard operating procedures for consultation. Region 5 has devoted considerable resources to conducting education and outreach to both tribes and states to develop an understanding of roles and responsibilities in cross-boundary federal environmental regulatory issues. Additionally, the Region has been working to develop a broader and more detailed understanding of treaty rights of Region 5 tribes. The Region is committed to developing more specific avenues to explore the role of treaty rights in environmental protection as a result of EPA's 2015 draft treaty rights guidance, and to continuing its efforts to bring all affected parties together in furthering the understanding the role of treaties in environmental protection issues.

**CHALLENGES AND LESSONS LEARNED:** Region 5 has encountered the following challenges and/or learned the following lessons:

- *Co-Management of Treaty Resources:* Tribes in Michigan, Wisconsin, and Minnesota have litigated some key treaties reserving rights in ceded territory. These cases upheld the existence of the right and basic issues regarding the division of regulatory authority and resources (e.g. state regulation of tribal members is generally precluded if tribes impose "effective" regulation; resources may be gathered on public lands within the ceded territory (and only those private lands open to the public for harvesting); resource harvest to be consistent with "modest" living in Wisconsin). Resource management, including harvest seasons, gear restrictions, take limits, and geographically defined resource areas have been developed through treaty resource organizations (Great Lakes Indian Fish and Wildlife Commission (GLIFWC); the Chippewa-Ottawa Resource Authority (CORA); the 1854 Treaty Authority (1854)) working together with states in cooperative co-management regimes. For states and for tribes, resource management has been carried out by agencies or offices that are either wholly separate from, or bifurcated

**Mulford, Eloise**

**Subject:** Region 5 Treaty Rights Briefing - Call-In Number: 1-866-299-3188 Access Code 202-564-6458

**Location:** See Attachments - OITA's Executive Conference Room, 3rd floor RRB #31204

**Start:** Fri 10/9/2015 10:00 AM

**End:** Fri 10/9/2015 10:30 AM

**Recurrence:** (none)

**Meeting Status:** Accepted

**Organizer:** Nishida, Jane

**Required Attendees:** Hedman, Susan; Williams, Felicia; Martinez, Isidra; Karin Koslow (Koslow.Karin@epa.gov); Chase, JoAnn; Silver, Edna; Hill, Randy; Starks, Angela; Shenkman, Ethan; Patrick, Monique; Siciliano, CarolAnn; Loving, Shanita; Guadagno, Tony; Maher, Lauren; Wester, Barbara; Buffo, Corey; Felicia Wright; Besougloff, Jeff; Harris, Dona; Kaplan, Robert; Frey, Bert; Ambutas, Kestutis; Mulford, Eloise

**Optional Attendees:** Hisel-McCoy, Sara

Region 5 will lead this briefing on tribal treaty rights in the region to prepare Jane Nishida, OITA; Susan Hedman, R5; JoAnn Chase, AIEO; and Ethan Shenkman, OGC for their October 14<sup>th</sup> tribal consultation on the draft *Guidance for Discussing Tribal Treaty Rights* in Region 5 (Madison, WI.)

Jeff Besougloff  
 Senior Policy Advisor  
 American Indian Environmental Office  
 U.S. EPA, Office of International and Tribal Affairs  
 Phone: (202) 564-0292

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Key Treaty Rights  
 Message Point...



Consultation  
 Version DRAFT ...



Treaty Rights in  
 Region 5 over...

**Ambutas, Kestutis**

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**From:** Wester, Barbara  
**Sent:** Wednesday, March 18, 2015 1:59 PM  
**To:** Ambutas, Kestutis  
**Subject:** Fw: summary of R5 treaty resources baseline information  
**Attachments:** Tribal Treaty Resources in Region 5.docx

casey - fyi - 1st of 2.

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**From:** Wester, Barbara  
**Sent:** Wednesday, March 11, 2015 7:52 AM  
**To:** Kaplan, Robert  
**Cc:** Lee, Sandra  
**Subject:** Fw: summary of R5 treaty resources baseline information

this is the r5 treaty resources doc

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**From:** Wester, Barbara  
**Sent:** Monday, March 9, 2015 9:40:34 PM  
**To:** Bustos, Patrick  
**Cc:** Lee, Sandra  
**Subject:** summary of R5 treaty resources baseline information

attorney -client privileged communication  
deliberative process

patrick - attached is my general summary of the information R5 has developed about assessing treaty rights. i will be checking emails tomorrow, then out for the rest of the week. so hopefully, you can let me know by tomorrow if this is sufficient for your briefing with randy. barbara

ps - i'm having internet access problems (tho at hq!) so let me know if you want me to upload to the sharepoint site too.



# THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC - 1 2014

## MEMORANDUM

**SUBJECT:** Commemorating the 30th Anniversary of the EPA's Indian Policy

**FROM:** Gina McCarthy

A handwritten signature in dark ink, appearing to read "Gina McCarthy", is written over the printed name.

**TO:** All EPA Employees

I am proud to recognize the U.S. Environmental Protection Agency's 30<sup>th</sup> anniversary of its Indian policy, and I want to thank everyone who has worked diligently to establish and sustain the agency's Indian program. As we mark this milestone, I also want to convey gratitude to our tribal-government partners for all their time, expertise and effort in building this important partnership with the EPA.

On November 8, 1984, the EPA issued its *Policy for the Administration of Environmental Programs on Indian Reservations*. In doing so, the EPA became the first federal agency to adopt a formal Indian policy to guide its relations with tribal governments in the administration of its programs. The 1984 Indian Policy represented – and continues to represent – a bold statement on the EPA's commitment to our partnership with federally recognized Indian tribes and to tribal self-governance in implementing environmental-protection programs.

The underlying principles of the 1984 Indian policy continue to guide our unique relationship with, and the federal trust responsibility to, federally recognized Indian tribes as expressed in treaties, statutes, executive orders and court decisions. The agency remains fully committed to engaging tribes as sovereign governments with a right to self-governance, which is a commitment the EPA made and has kept since our agency's founding.

### Tribal Treaty Rights

Under the U.S. Constitution, treaties have the same legal force as federal statutes. And the United States' government-to-government relationship with and trust responsibility to federally recognized Indian tribes reinforces the importance of honoring these treaty rights. As such, the EPA has an obligation to honor and respect tribal rights and resources protected by treaties. While treaties do not expand the EPA's authority, the EPA must ensure its actions do not conflict with tribal treaty rights. In addition, EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so. To help guide the agency's decisions when treaty rights should be considered, the Office of General Counsel and the American Indian Environmental Office will develop an analytical framework, with input and consultation from other EPA offices and tribal governments.



*Attorney-Client Privilege - Deliberative; For EPA Internal Use Only; Do Not Release to Public — Preliminary Working Draft January 13, 2015*

## Framework for Understanding & Respecting Tribal Treaty Rights

### Background

In her December 1, 2014 statement commemorating the anniversary of EPA's 1984 Indian Policy, EPA Administrator Gina McCarthy recognized that "treaties have the same legal force as federal statutes," that "EPA must ensure its actions do not conflict with tribal treaty rights," and that "EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so."<sup>1</sup> The Administrator also noted that, to help guide the Agency's decisions when treaty rights should be considered, the Office of General Counsel and the American Indian Environmental Office would develop this analytical framework, with input and consultation from other EPA offices and tribal governments.<sup>2</sup>

To better understand where, when, and how to consider tribal treaty rights, this document provides a general analytical framework to assist EPA personnel in asking the right questions as they carry out their responsibilities. This document does not establish new EPA policy; rather, it provides a step-by-step process that may be followed to better understand whether, where, and how tribal treaties may impact EPA actions. As explained below, this framework outlines five questions, as an initial inquiry, that staff can ask to help determine whether treaty rights should be considered. It does not address, however, the sometimes-challenging questions that may arise when treaties are found to be relevant to specific EPA activities. In those scenarios, EPA personnel will inevitably need to carefully consider the specifics of the treaties in question, and the context and circumstances of any particular situation.<sup>3</sup>

Following the steps in this document before taking an action will help determine whether the proposed action may affect tribal treaty rights or treaty-protected resources or their uses.

<sup>1</sup> Memorandum from Administrator Gina McCarthy to All Employees, Commemorating the 30<sup>th</sup> Anniversary of EPA's Indian Policy (December 1, 2014).

<sup>2</sup> Some additional legal background: Under Article VI of the United States Constitution, treaties, including treaties with Indian tribes ("tribal treaties"), are the supreme law of the land with the same legal force as federal statutes, including the environmental statutes that EPA implements. Once ratified, treaties may only be modified or repealed by Congress, and any modifications or repeals must be clear and express. Treaties are legal obligations of the United States government. EPA and other federal agencies must, therefore, give full effect to treaty rights reserved by tribes by ensuring that the actions they take protect tribal treaty rights. This means that just as EPA complies with environmental statutory and regulatory requirements, EPA also needs to ensure that its actions under those statutes and regulations are consistent with tribal treaty rights. Although treaties do not expand EPA's statutory authority, treaty rights can limit, or may prohibit, EPA from taking an otherwise lawful action if the action would infringe on a treaty right. Treaty rights can also inform how EPA exercises its discretionary authority.

For more information on the history of federally recognized Indians and tribal treaties and basic principles of Indian law, visit the "Frequently Asked Questions" webpage on the U.S. Department of the Interior's Indian Affairs website at <http://www.bia.gov/FAQs/>.

<sup>3</sup> This document is intended solely to improve the internal management of EPA and is not intended to or create any right or benefit, substantive or procedural, enforceable at law or in equity, against the Agency, its officers or employees, or any other person.

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Preliminary Working Draft January 13, 2014*

issues may arise that involve precedent-setting questions with respect to how the federal government works with tribes across the country. A treaty-rights analysis may produce a range of options for EPA action rather than identifying one "right" answer.

Early discussions with appropriate EPA managers, ORC or OGC Indian law attorneys, EPA Indian Coordinators, appropriate tribal program staff, and the American Indian Environmental Office staff, can help work through the complexities of these issues. Where EPA is considering the meaning of a treaty with implications beyond EPA's programs, coordination with other agencies, such as the Department of the Interior Solicitor's Office and/or Bureau of Indian Affairs, may also be necessary.

Finally, keep in mind that some tribes are cautious about asserting their treaty rights in a given situation. Should EPA's action be challenged in court, a court could issue a decision adverse to the tribe's view of its rights. Therefore, consultation and coordination with tribes early in the process to understand whether and to what extent they are comfortable asserting their treaty rights can be very helpful and important to ensuring EPA makes a final decision that is well-informed by a full understanding of the applicable treaties.

*Deliberative Process Document; For EPA Internal Use Only; Do Not Release to Public — Preliminary Internal Working Draft, July 22, 2015*

## **EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights**

### **Introduction**

This Guidance provides assistance on implementing the *EPA Policy on Consultation and Coordination with Indian Tribes* when tribal treaty rights relating to natural resources<sup>1</sup> may exist in a specific geographic area that is the focus of a proposed EPA decision or action. In these instances, during consultation with federally recognized tribes (tribes) EPA will seek to obtain tribal treaty rights information in accordance with this Guidance. EPA will subsequently consider treaty rights information obtained to help ensure that EPA actions do not conflict with treaty rights and to inform EPA when it exercises its discretionary authority to enhance protection of treaty rights as highlighted in the EPA Administrator McCarthy's December 1, 2014 Memorandum, *Commemorating the 30<sup>th</sup> Anniversary of EPA's Indian Policy*. This Guidance does not, however, create any new legal obligations for EPA or expand the authorities granted by EPA's underlying statutes nor does it alter any existing EPA treaty responsibilities.

### **Determining When to Ask About Treaty Rights in Tribal Consultation**

EPA consultation with tribes provides the opportunity to ask when a proposed EPA action that is focused on a specific geographic location may affect treaty-protected rights. Because treaty rights analyses are complex, staff are encouraged to inquire early about treaty rights.

Based on experience to date, certain types of EPA actions, which are focused on a specific geographic area, are more likely than others to have potential implications for treaty-protected natural resources. For example, EPA review of tribal or state water quality standards as a basis for National Pollutant Discharge Elimination System permits typically focus on a specific water body. If a treaty reserves to tribes a right to fish in the water body, then the Agency should consult with tribes on treaty rights since protecting fish may involve water quality in the watershed.

Another example of such an action may be a site-specific decision made under the Comprehensive Environmental Response, Compensation, and Liability Act, such as the use of any approved Applicable or Relevant and Appropriate Requirements or a Record of Decision. Other examples include a site-specific landfill exemption determination under the Resource Conservation and Recovery Act or other similar types of regulatory exemptions for specific geographic areas. In each case, consulting using the questions in this Guidance may be

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<sup>1</sup> This Guidance focuses on consultation in the context of tribal treaties. EPA recognizes, however, that there are similar tribal rights in other sources of law such as federal statutes (e.g., congressionally enacted Indian land claim settlements).

**Mulford, Eloise**

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**From:** Ambutas, Kestutis  
**Sent:** Wednesday, August 19, 2015 8:17 AM  
**To:** Mulford, Eloise  
**Subject:** FW: Revised Draft of "EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights" for Review by the Indian Programs Policy Council  
**Attachments:** Internal IPPC Draft Policy Treaty Rights 7 22 15.docx

**From:** Starks, Angela On Behalf Of Hill, Randy  
**Sent:** Wednesday, July 22, 2015 4:50 PM  
**To:** IPPC Members  
**Cc:** IPPC Steering Committee  
**Subject:** Revised Draft of "EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights" for Review by the Indian Programs Policy Council

Dear Fellow IPPC Members:

Thank for your submission of comments on the draft policy (May 21, 2015) – We greatly appreciate the time and effort that went into your Region/Office's review. We have been working with the agency-wide Tribal Treaty Rights Workgroup and others to create this attached revised draft (July 22, 2015). As a result of the comments we received the attached document has several substantive changes we want to bring to your attention and discuss further with you at the July 28<sup>th</sup> IPPC meeting:

- The title has been revised to characterize this document as guidance and not a policy.
- The guidance clarifies as a footnote that the focus of this guidance is ratified treaties but also acknowledges that there are similar tribal rights in other sources of law such as federal statutes (e.g., congressional enacted Indian land claim settlements).
- The guidance provides what EPA initial steps are post-consultation.

In addition to these substantive changes above, many of you provided red-line edits to clarify language throughout the guidance which we appreciate and many of which we have taken.

Thank you in advance for your patient attention to this revised draft, and please don't hesitate to contact me if you have any questions. I look forward to our discussions on the 28<sup>th</sup> of July and to highlighting some of the implementation resources we are developing to support our EPA staff.

Best regards,

Randolph L. ("Randy") Hill  
 Deputy Assistant Administrator



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 17 2015

Office of  
International and Tribal Affairs

Re: Notification of Consultation and Coordination on EPA's guidance: *EPA Policy on Consultation and Coordination with Indian Tribes: Draft Guidance for Discussing Tribal Treaty Rights*.

Dear Honorable Leader:

The U.S. Environmental Protection Agency (EPA) is initiating consultation and coordination with federally recognized tribes (tribes) on how EPA will discuss tribal treaty rights during tribal consultations under the *EPA Policy for Consultation and Coordination with Indian Tribes*. EPA is proposing development of a guidance on when and how EPA would raise questions about treaty rights, and as a guide for discussions when tribes raise treaty rights concerns during tribal consultation under the Consultation Policy. The draft guidance, *EPA Policy on Consultation and Coordination with Indian Tribes: DRAFT Guidance for Discussing Tribal Treaty Rights* is enclosed.

This draft Guidance was developed and is designed to establish the clear expectation that EPA should ask specific questions during tribal consultation when an action or decision will impact a specific geographic area where treaty resource rights are present.

EPA's anticipated timeline for this consultation and coordination is August 17, 2015 through October 16, 2015. EPA invites you or your designated consultation representative(s) to participate in this process.

In December 2014<sup>1</sup>, EPA Administrator Gina McCarthy commemorated the 30<sup>th</sup> anniversary of the 1984 EPA Indian Policy and issued a memo regarding the importance of treaty rights and EPA's work, stating:

Under the U.S. Constitution, treaties have the same legal force as federal statutes. And the United States' government-to-government relationship with and trust responsibility to federally recognized Indian tribes reinforces the importance of honoring these treaty rights. As such, the EPA has an obligation to honor and respect tribal rights and resources protected by treaties. While treaties do not expand the EPA's authority, the EPA must

<sup>1</sup> <http://www.epa.gov/tribalportal/pdf/indianpolicytreatyrightsmemo2014.pdf>

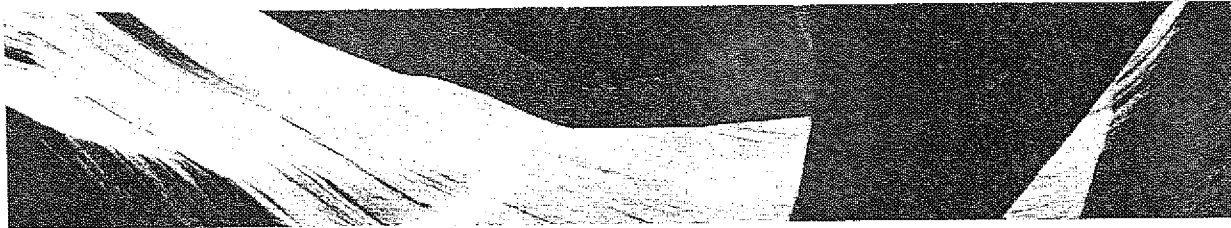
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### Frequently Asked Questions

#### I. Why Tribes Exist Today in the United States

##### *What are Indian treaty rights?*

From 1778 to 1871, the United States' relations with individual American Indian nations indigenous to what is now the U.S. were defined and conducted largely through the treaty-making process. These "contracts among nations" recognized and established unique sets of rights, benefits, and conditions for the treaty-making tribes who agreed to cede of millions of acres of their homelands to the United States and accept its protection. Like other treaty obligations of the United States, Indian treaties are considered to be "the supreme law of the land," and they are the foundation upon which federal Indian law and the federal Indian trust relationship is based.

##### *What is the legal status of American Indian and Alaska Native tribes?*

Article 1, Section 8 of the United States Constitution vests Congress, and by extension the Executive and Judicial branches of our government, with the authority to engage in relations with the tribes, thereby firmly placing tribes within the constitutional fabric of our nation. When the governmental authority of tribes was first challenged in the 1830's, U. S. Supreme Court Chief Justice John Marshall articulated the fundamental principle that has guided the evolution of federal Indian law to the present: *That tribes possess a nationhood status and retain inherent powers of self-government.*

##### *What is the federal Indian trust responsibility?*

The federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942). This obligation was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831). Over the years, the trust doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law.

The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.

***How large is the national American Indian and Alaska Native population?***

According to the U.S. Bureau of the Census, the estimated population of American Indians and Alaska Natives, including those of more than one race, as of July 1, 2007, was 4.5 million, or 1.5 per cent of the total U.S. population. In the BIA's 2005 American Indian Population and Labor Force Report, the latest available, the total number of enrolled members of the (then) 561 federally recognized tribes was shown to be less than half the Census number, or 1,978,099.

***Why are American Indians and Alaska Natives also referred to as Native Americans?***

When referring to American Indian or Alaska Native persons, it is still appropriate to use the terms "American Indian" and "Alaska Native." These terms denote the cultural and historical distinctions between persons belonging to the indigenous tribes of the continental United States (American Indians) and the indigenous tribes and villages of Alaska (Alaska Natives, i.e., Eskimos, Aleuts, and Indians). They also refer specifically to persons eligible for benefits and services funded or directly provided by the BIA.

The term "Native American" came into broad usage in the 1970's as an alternative to "American Indian." Since that time, however, it has been gradually expanded within the public lexicon to include *all* Native peoples of the United States and its trust territories, i.e., American Indians, Alaska Natives, Native Hawaiians, Chamorros, and American Samoans, as well as persons from Canada First Nations and indigenous communities in Mexico and Central and South America who are U.S. residents.

***Are American Indians and Alaska Natives wards of the Federal Government?***

No. The Federal Government is a trustee of Indian property, not a guardian of all American Indians and Alaska Natives. Although the Secretary of the Interior is authorized by law to protect, where necessary, the interests of minors and adult persons deemed incompetent to handle their affairs, this protection does not confer a guardian-ward relationship.

***Are American Indians and Alaska Natives citizens of the United States?***

Yes. As early as 1817, U.S. citizenship had been conferred by special treaty upon specific groups of Indian people. American citizenship was also conveyed by statutes, naturalization proceedings, and by service in the Armed Forces with an honorable discharge in World War I. In 1924, Congress extended American citizenship to all other American Indians born within the territorial limits of the United States. American Indians and Alaska Natives are citizens of the United States and of the individual states, counties, cities, and towns where they reside. They can also become citizens of their tribes or villages as enrolled tribal members.

***Do American Indians and Alaska Natives have the right to vote?***

Yes. American Indians and Alaska Natives have the right to vote just as all other U.S. citizens do. They can vote in presidential, congressional, state and local, and tribal elections, if eligible. And, just as the federal government and state and local governments have the sovereign right to establish voter eligibility criteria, so do tribal governments.

***Do American Indians and Alaska Natives have the right to hold public office?***

Yes. American Indians and Alaska Natives have the same rights as other citizens to hold public office. Over the years, American Indian and Alaska Native men and women have held elected and appointed offices at all levels of federal, state, and local government. Charles Curtis, a member of the Kaw Tribe of Kansas, served in both houses of Congress before holding the second highest elected office in the nation – that of Vice President of the United States under President Herbert Hoover. American Indians and Alaska Natives also serve in state legislatures, state judicial systems, county and city governments, and on local school boards.

***Do American Indians and Alaska Natives have special rights different from other citizens?***

Any "special" rights held by federally recognized tribes and their members are generally based on treaties or other agreements between the tribes and the United States. The heavy price American Indians and Alaska Natives paid to retain certain rights of self-government was to relinquish much of their land and resources to the United States. U.S. law protects the inherent rights they did not relinquish. Among those may be hunting and fishing rights and access to sacred sites.

***Do American Indians and Alaska Natives pay taxes?***

Yes. They pay the same taxes as other citizens with the following exceptions:

- Federal income taxes are not levied on income from trust lands held for them by the U.S.
- State income taxes are not paid on income earned on a federal Indian reservation.
- State sales taxes are not paid by Indians on transactions made on a federal Indian reservation.
- Local property taxes are not paid on reservation or trust land.

***Do laws that apply to non-Indians also apply to Indians?***

Yes. As U.S. citizens, American Indians and Alaska Natives are generally subject to federal, state, and local laws. On federal Indian reservations, however, only federal and tribal laws apply to members of the tribe, unless Congress provides otherwise. In federal law, the Assimilative Crimes Act makes any violation of state criminal law a federal offense on reservations. Most tribes now maintain tribal court systems and facilities to detain tribal members convicted of certain offenses within the boundaries of the reservation.

***Do all American Indians and Alaska Natives speak a single traditional language?***

No. American Indians and Alaska Natives come from a multitude of different cultures with diverse languages, and for thousands of years used oral tradition to pass down familial and cultural information among generations of tribal members. Some tribes, even if widely scattered, belong to the same linguistic families. Common means of communicating between tribes allowed trade routes and political alliances to flourish. As contact between Indians and non-Indians grew, so did the necessity of learning of new languages. Even into the 20th century, many American Indians and Alaska Natives were bi- or multilingual from learning to speak their own language and English, French, Russian, or Spanish, or even another tribal language.

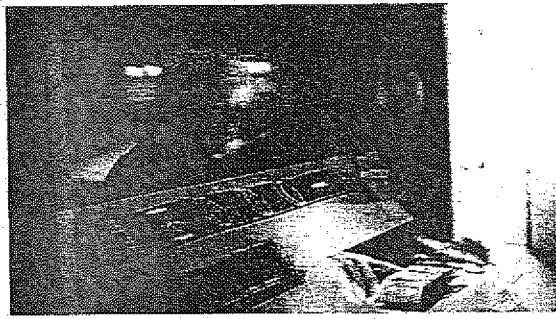
It has been reported that at the end of the 15th century over 300 American Indian and Alaska Native languages were spoken. Today, fewer than 200 tribal languages are still viable, with some having been translated into written form. English, however, has become the predominant language in the home, school, and workplace. Those tribes who can still do so are working to preserve their languages and create new speakers from among their tribal populations.

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## EPA and Tribal Treaty Rights



*On December 1, 2014, U.S. EPA Administrator McCarthy issued an important tribal program memorandum celebrating the 30th Anniversary of EPA's 1984 Indian Policy and reinforcing EPA's longstanding views of Indian treaties. Left: Administrator McCarthy viewing a wampum belt that represents a treaty between the U.S. and Tribal Governments at the Smithsonian's National Museum of the American Indian. (Photo credit: EPA)*

- EPA recognizes that treaties have the same legal force as federal statutes.
- EPA acknowledges that we have an obligation to honor and respect tribal rights and resources protected by treaties.
- While treaties do not expand EPA's authority, EPA must ensure its actions do not conflict with tribal treaty rights.
- EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when EPA has discretion to do so.
- EPA also understands that treaty rights frequently protect resources both on and off Indian reservations. These rights frequently include, for example, hunting, fishing, and gathering rights. There also may be other resources that treaties reserve to tribes.
- Each situation is unique, and EPA plans to develop a framework to assist in understanding tribal treaty rights and when EPA activities might affect those rights. EPA plans to make the framework available for tribal consultation after March 2015.
- Until the new framework is in place, EPA plans to continue working with tribes on treaty-rights matters that may impact them.

To view the Administrator's memorandum on tribal treaty rights, visit our website:

<http://www.epa.gov/tribal/pdf/indianpolicytreatyrightsmemo2014.pdf>



## EPA Indian Policy – The Nine Principles

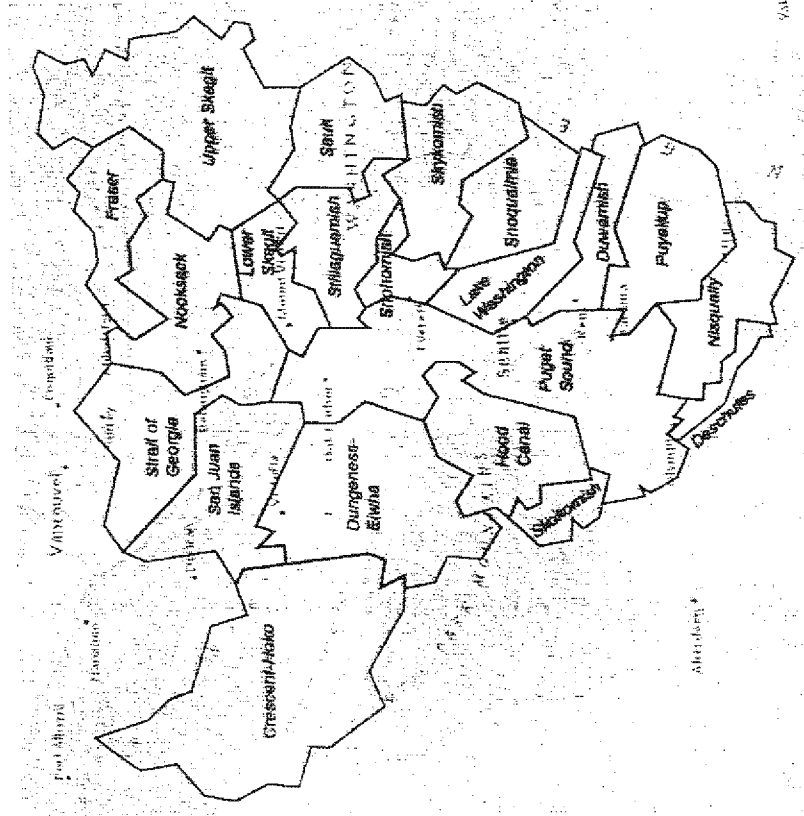
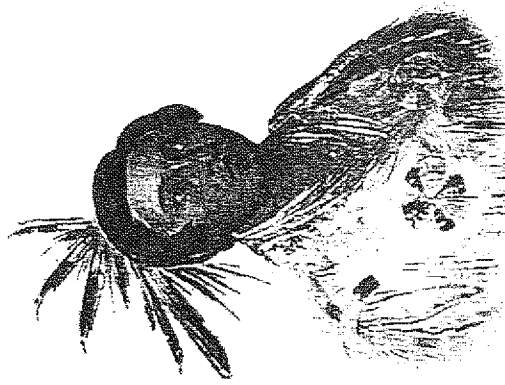
1. Work proactively and directly with Indian tribes (“**govt.-to-govt.**”).
2. Recognize the **sovereignty** of tribal governments to set standards, make policy decisions, and manage reservation programs.
3. Encourage and **assist tribes** to take regulatory and program management responsibilities for reservation lands.
4. Identify and **remove** existing legal and procedural **impediments** to working effectively with tribes
5. In keeping with the **Federal Trust Responsibility**, ensure that tribal concerns and interests are **considered** whenever actions may affect reservation environments.
6. Encourage **cooperation** between tribal, state, and local governments.
7. **Enlist other federal agencies** with related responsibilities on Indian reservations to support cooperative efforts.
8. **Ensure compliance** with environmental statutes and regulations on Indian reservations.
9. **Incorporate** these principles into planning and management activities, and ongoing policy and regulation development processes.

## Where Treaty Rights apply

- Stevens Treaties apply in Washington, Oregon, and Idaho. Used as illustrative example in this presentation.
- Chippewa Treaties apply in the Great Lakes region.
- Unique non-treaty based sustenance rights based on statutes apply in Maine.
- Most tribes have hunting, fishing, and gathering rights on their reservations.
- Some have off-reservation rights.

## Puget Sound Tribes

This map shows some of the fishing rights of Puget Sound tribes. This map may not be a complete representation, however.



# Stevens Treaties: Boldt's Key Findings

(*U.S. V. Washington*, 384 F. Supp. 312 (1974))

- **Subsistence & Religious Fishing Paramount:** “The evidence shows beyond doubt that at treaty time the opportunity to take fish for personal subsistence and religious ceremonies was the single matter of utmost concern to all treaty tribes and their members.”
- **Commercial Fishing Also Guaranteed:** “The taking of fish for ceremonial and subsistence purposes has a special treaty significance distinct from and superior to the taking of fish for commercial purposes . . . .”
- **Fishing Vitrally Important:** “Fishing is vitally important to the people of the tribe . . . both for subsistence and a livelihood.”
- **Supreme Court Confirms:** The right to fish is more than “merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.” 443 U.S. 658 (1979).

**Development Timeline for Draft Framework for Understanding and Respecting Treaty Rights**

- Phase I: Develop Working Draft for Consultation [Jan – March]
- Phase II: Tribal Consultation [April-June]
- Phase III: Revise Document Based on Consultation [July – Aug]
- Phase IV: Final Internal Agency Review [Sept – Oct]
- Phase V: Finalize and Distribute Framework [Nov]

In addition, a Consultation Plan will be developed, along with a communications/outreach plan and key messages document to support Agency-wide dialogue with tribes during consultation.

**Working Timeline for Phase I:**

<b>TASK</b>	<b>Date</b>	<b>Deadline</b>
Distribute Draft Framework for Review	1/20/15	
Meet with Review Team before Comments are Due	TBD	2/12/15
IPPC Meeting to Review Process and Draft Framework	2/3/15	
Comments Due		2/13/15
Review Team Recommendations Due		3/2/15
Recommendations and Set of All Comments Shared with DRAs and DAAs		3/3/15
IPPC Steering Committee Meeting	3/5/15	
IPPC Meeting to Discuss Recommended Changes to Draft Framework	3/12/15	
Final IPPC Recommendations on Draft Framework Due to OGC & OITA		3/18/15
REVISED DRAFT for Consultation Approved by General Counsel & OITA Acting AA	3/23/15	
FINAL DRAFT for Consultation shared with DRAs and DAAs	3/26/15	
Begin Consultation	3/30/15	3/30/15
Consultation Period Ends		6/30/15



## EPA Indian Policy – The Nine Principles

1. Work proactively and directly with Indian tribes ("**govt.-to-govt.**").
2. Recognize the **sovereignty** of tribal governments to set standards, make policy decisions, and manage reservation programs.
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EPA Treatment As a State (TAS): Tribes within the State of Minnesota \*\*

TRIBES	CLEAN WATER ACT <sup>1,4</sup>				CLEAN AIR ACT <sup>2,5</sup>		
	106	319	303/401	404	105	505a(2)	126
Bois Forte Band	10/1998						
Fond du Lac Band	7/1992	12/2004	5/1996*		1/2004	1/2004	
Grand Portage Band	12/1996	1/2005	7/1996*		Pending <sup>3</sup>	Pending <sup>3</sup>	
Leech Lake Tribe	6/1995				9/2007	9/2007	
Lower Sioux Indian Community	9/1999						
Mille Lacs Band	4/1991				Pending <sup>3</sup>	Pending <sup>3</sup>	
Minnesota Chippewa Tribe	1989						
Prairie Island Com.	9/1999	10/2010					
Red Lake Band	9/1989	12/2008			2/2014	2/2014	
Shakopee Mdewakanton	5/1997	12/2007					
Upper Sioux Indian Community	9/1999						
White Earth Band	7/1992						

**\*\*This summary is provided for information purposes only and does not create, limit or otherwise affect EPA or tribal positions or status under any statute or regulation.**

<sup>1</sup>**Clean Water Act (CWA) Section 106:** Water Resources Program; **319:** Non-point Source Program; **303/401:** Water Quality Standards and Certification Program (\* = approved WQS); and **404:** Wetlands Dredge and Fill Program

<sup>2</sup>**Clean Air Act Programs - 105:** Approved for Section 105 grants at the reduced 5% match; **505a(2):** "Affected State" status for Title V permits under Section 505a(2); and **126:** Interstate pollution abatement

<sup>3</sup>The Regional Administrator has deemed these applications complete and EPA has notified the state/appropriate governmental entities and public and received comments. Final TAS eligibility determinations are pending. EPA provides notice to states where tribes seek CWA authority, except for non-regulatory authorities under CWA 106 and 319; however, tribes have a public notice and comment requirement under CWA 319 that they directly implement.

<sup>4</sup>EPA Websites: The list of tribes with federally approved WQS is on the following EPA's website:

<https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards>

Additionally, EPA's website provides this portal to understanding what authorities tribes may assume under federal programs:

<https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas>

<sup>5</sup> EPA notifies the state when any tribe applies to seek authority under the tribal authority rule (40 CFR 49.9(b)).



## **Treaty Rights and Subsistence Fishing in the U.S. Waters of the Great Lakes, Upper Mississippi River, and Ohio River Basins**

**June 2012**



**U.S. Army Corps  
of Engineers**  
*Product of the GLMRIS Team*

The Great Lakes and Mississippi River Interbasin Study (GLMRIS) Team consists of a regional, collaborative effort led by the U.S. Army Corps of Engineers (Corps), including various District and Division offices, as well as Corps Centers of Expertise and Research Laboratories. Products of the GLMRIS Team are also made possible in collaboration with various federal, state, local, and non-governmental stakeholders.

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## ACKNOWLEDGMENTS

We are grateful that throughout our research, we were afforded the chance to work with knowledgeable professionals. We would like to thank all the representatives of the Native American tribes who took the time to sit with us and talk about their valuable resources:

- Vice-Chairman Marvin DeFoe, Subsistence Fisherman Charles Newago, Treaty Natural Resources Administrator Chad Abel, Fisheries Specialist Bryan Bainbridge, and Tribal Historic Preservation Officer Larry Balber of the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin;
- Water Resource Specialist Naomi Tillison, Fisheries Specialist Tim Wilson, Fishery Technician Ed Leoso, Subsistence Fisherman Michael Plucinski, and Tribal Historic Preservation Officer Edith Leoso of the Bad River Band of Lake Superior Chippewa Tribe;
- Director of Biology and Environment Seth Moore, Fish and Wildlife Biologist E.J. Isaac, and Chairman Norman Deschampe of the Grand Portage Band of Lake Superior Chippewa Indians;
- Natural Resources Director Thomas Howes and Tribal Historic Preservation Officer Leroy DeFoe of the Fond du Lac Band of Lake Superior Chippewa Indians; and
- Cecil Pavlat, Tribal Historic Preservation Officer for the Sault Ste. Marie Tribe of Chippewa Indians of Michigan.

We would like to thank the intertribal organizations for helping us to understand their roles in administering the different treaties and allowing us to interview them. We thank the Director of the Administration for Native Americans Program, H. James St. Arnold; Inland Fisheries Specialist, Joe D. Rose, Jr.; and Great Lakes Fisheries Specialist, Bill Mattes, of the Great Lakes Fish and Wildlife Commission. We also thank Executive Director, Sonny Myers, and Director of the Resource Management Division, Andy Edwards, at the 1854 Treaty Authority.

In addition, we would also like to thank the government agencies who were willing to share their information with us and guide us to the right places to gather our information. Special thanks go to the Michigan Department of Natural Resources, Fisheries Division, and to David Caroffino and Dennis Knapp at the Wildlife Division. We thank Fisheries Biologist, Scott Hanson, and Lake Superior Fisheries Team Supervisor, Peter Stevens, at the Wisconsin Department of Natural Resources as well.

Finally, we would like to thank Elizabeth Hocking, of Argonne National Laboratory, for her research on treaties and other legal issues and Hal Greenwood, also of Argonne, for creating the maps included in this report.

opportunities. The introduction of ANS is another component that could threaten their traditional ways of life. This study assesses the economic and cultural importance of subsistence harvesting for tribal communities in the Great Lakes, Upper Mississippi River, and Ohio River Basins.

Four separate treaties reserve subsistence hunting, gathering, and fishing rights for tribes in ceded territories in Michigan, Wisconsin, and Minnesota. Both the Ojibwe (Chippewa) and Ottawa bands retain these rights under the treaties, and both are also engaged in these subsistence activities. Although these communities and harvests associated with these activities are small, the activities do play a large role in the tribes' cultural identities. Typically, only a small number of tribal members are fully engaged in subsistence harvesting, but their harvest is shared with many throughout the community. They share their harvest with family, friends, and those in the community unable to fish. Typically, some of the people in the tribes are unable to purchase fish and would go without fish if they were not able to share in the subsistence harvest. Thus, subsistence harvesting is a core value for these bands, and the right to fish and hunt for subsistence is cherished by all, even those who are not presently engaged in the practice. It is part of the tribes' cultural identity and an indication of their status as sovereign entities.

Because of the importance of subsistence fishing, the tribes are concerned about the prospect of ANS damaging their fish harvest. The Algonquian tribes traditionally have seen themselves as having been placed along the Great Lakes and the Mississippi River by their Creator and given the responsibility of stewardship over their environment. The Iroquoian and Sioux tribes have also used the resources within the study area because they believe that those are the resources they have been given by their Creator to sustain themselves.

The valuation of subsistence harvests used a production cost model, which assumes that the value of subsistence fish harvests is equal to the cost of equipment, travel, and labor expended on subsistence activities. The annual value of subsistence activities to an individual household was estimated to be between approximately \$15,000 and \$16,500. Limitations associated with the production cost model meant that the amount of subsistence value that can be ascribed to social and cultural values, as distinct from food production, could not be determined.

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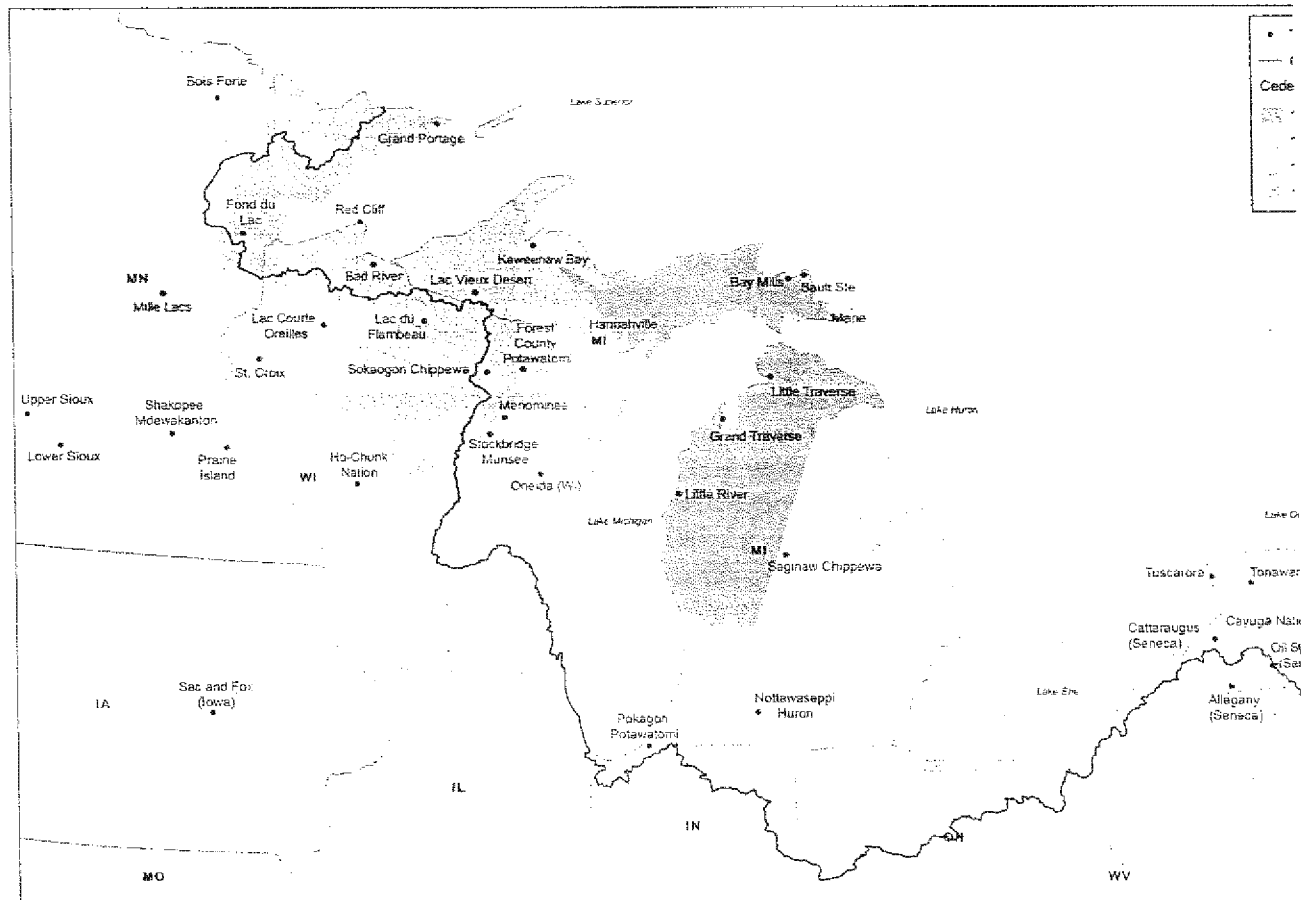


FIGURE 1.3 Areas Ceded by Treaty Where Subsistence Rights Were Retained

Six years later, in 1985, the tribes, the State of Michigan, the United States, and concerned citizen groups negotiated the conditions under which tribal members could exercise their Article 13 Rights. The federal courts recognized that the agreements were successful and issued a consent decree to govern tribal harvesting. The 1985 decree had a 15-year duration and dealt only with Great Lakes waters. The decree was renegotiated and reissued in 2000 with a 20-year duration; it is currently in force.

Negotiators of the 2000 consent decree mutually agreed to leave inland treaty rights to later adjudication. The 2000 decree is concerned mainly with commercial fishing by tribal members and serves to resolve differences over the allocation, management, and regulation of fishing in 1836 Treaty waters in Lake Michigan, Lake Superior, Lake Huron, and connecting waters. It allows for subsistence fishing by commercial fishers in the same waters where commercial fishing is allowed. However, the decree limits the size of nets and the take allowed for subsistence fishers. In addition, subsistence fishers must be licensed by tribes, and the tribes must report the subsistence take to CORA, which provides the information to the Michigan Department of Natural Resources. In response to these conditions, CORA has been delegated certain management and regulatory authority over treaty-based harvests of wild resources on the 1836 ceded lands. The Great Lakes Resources Committee of CORA also promulgates tribal fishing regulations in the Great Lakes.

In 2003, litigation began on “inland harvesting,” defined as subsistence harvesting on lands, lakes, and rivers within portions of Michigan’s Upper and Lower Peninsulas ceded under the 1836 Treaty. The purpose of the litigation was to establish whether inland Article 13 Rights existed, and, if so, where they could be exercised. An agreement in principle was reached in 2006, and the Inland Consent Decree was issued in 2007. Unlike the 2000 Consent Decree, the 2007 Inland Consent Decree was designed to last in perpetuity.

Under the 2007 Inland Consent Decree, Article 13 Rights are affirmed on most public and publicly accessible lands and waters in the ceded territories. The only time harvesting is not permitted within public lands is when an area is protected or deemed necessary for the maintenance and restoration of fisheries and other wildlife populations. The decree covers fishing, hunting, and gathering. In most cases, commercial harvesting is prohibited. Special consideration is given to species, such as elk and bear, that require allocation. These species have limited wild populations, and hunting permits must be allocated between tribal and non-tribal hunters. Bears are a special case. Each tribe is allotted an annual take of two individuals for medicinal/ceremonial purposes beyond the year’s hunting quota.

#### 1.5.2.2 1837 Treaty

In the 1837 Treaty with the Chippewa, also known as the Pine Tree Treaty, inland portions of Wisconsin and Minnesota, including part of the Upper Mississippi Basin, were ceded to the United States (Figure 1.3) (Arnold 2011). Article 5 of the Pine Tree Treaty states, “The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes

## 2 TRADITIONAL SUBSISTENCE ACTIVITIES

The area under investigation consists of the U.S. portions of the five Great Lakes and connecting waters; the Upper Mississippi River north from Cairo, Illinois; the Ohio River Basin; and any inland lakes, streams, and rivers with an unimpeded aquatic connection to the Great Lakes, the Upper Mississippi River, or the Ohio River, where subsistence fishing may take place (Figure 1.2). Before the arrival of Europeans, the study area was dominated by woodlands and prairies, crossed by numerous rivers and streams, and surrounded or bordered by large and small lakes. The ecozones created by this type of vegetation and landscape provided an abundance of natural resources that could be utilized in a seasonal round, in which indigenous bands moved to take advantage of resources, including fish, game, and wild rice.

The tribes who settled adjacent to and near the Great Lakes utilized similar natural resources; therefore, traditional subsistence strategies within the Great Lakes Basin did not vary greatly. Tribes who settled in the Upper Mississippi River and Ohio River Basins shared an environment similar to that of the tribes who settled near the Great Lakes but depended more on agricultural practices to sustain their communities. Subsistence patterns identified in the study area included fishing, hunting, gathering of wild rice, and agriculture. For some groups, such as the Algonquians (e.g., Chippewa/Ojibwe, Ottawa), fishing was more reliable than agriculture because the group occupied an area where fish were abundant and crop cultivation was constrained by the number of frost-free days (Tanner 1987). Other tribal groups, such as the Iroquoians, relied more heavily on cultivation because they lived in a more temperate climate (Tanner 1987). In the area west of Lake Michigan and south and west of Lake Superior, wild rice was an important food source (Tanner 1987). All groups included hunting in their subsistence base.

European contact initiated changes to the way indigenous populations utilized the available natural resources. The arrival of European fur traders caused the Native Americans to intensify their traditional hunting strategies in order to acquire furs to barter for European technology. Later, Euro-American population movements from the East Coast caused displacement of native communities, and they brought them new technology that would be used to modify natural resources (Tanner 1987). In the first half of the 19th century, natural resources began to decline as a result of logging and the introduction of exotic plant species. It was at this time that Native American subsistence patterns were greatly altered and that most land-ceding treaties discussed here were concluded (Tanner 1987).

Traditional subsistence resources utilized by Native Americans varied with the season and the local environment. For example, during the summer and fall seasons, Chippewa men would travel to and camp out at productive fishing sites; however, fishing was conducted year round. In the spring, three to four weeks were given to making maple sugar. In the fall, wild rice would be harvested along with the agricultural crops. Hunting would take place year round but was mostly conducted in summer and winter when the other subsistence resources were running low (Jenks 1900). Some fish species, such as herring and whitefish, could be preserved through winter by smoking and drying, since they were caught in the fall; spring sturgeon could not be preserved (White 1991). The preservation of fish was largely dependent on the climate. Fish

and notched stones were used as net sinkers for these types of nets (Densmore 1979). These nets were mostly utilized in the Great Lakes, where they were placed perpendicular to the shore, hung from canoes or floats offshore, or used through holes in the ice during the winter (Rostlund 1952). Today, trap nets are a permitted method most commonly used by commercial fishermen, but they can also be used by subsistence fishermen.

Small hand nets, such as dip nets and scoop nets, also were used wherever fishing was practiced traditionally. For instance, long-handled dip nets were used in Sault St. Marie, where the fish were plentiful (Rostlund 1952). Nets were most commonly used in the Great Lakes Basin. The fish species commonly taken with a net by indigenous fishers were sturgeon, lake trout, grayling, whitefish, smelt, freshwater cod, bass, sunfish, trout, and perch (Rostlund 1952). Small hand nets are still used today by subsistence fishermen and are a permitted method of fishing within the ceded territories.

### 2.1.2 Weirs and Traps

The use of weirs and traps is one of the oldest Native American fishing methods known from historical records. Many types of weirs and traps were built to catch specific species or sizes of fish, often taking advantage of the unique features of a given water body. Small traps were made with twigs and branches and were constructed to catch small fish. These traps would be placed in shallow water, where the lake current would carry the fish into the trap (Densmore 1979). For example, sturgeon racks were built to catch large Lake Superior fish. Sturgeon racks were gates made out of rocks and strong fibers that were placed at the mouths of rivers flowing into Lake Superior. In the spring, the sturgeon would travel upstream to spawn, and the trap would block the fish. Native Americans then would kill the fish by clubbing them or catching them with hooks (Densmore 1979). Sturgeons were the most common species taken with weirs and traps (Rostlund 1952). Weirs and traps were most commonly documented in the Great Lakes and Ohio River Basins.

Weirs and traps are not commonly used today. CORA regulations state that commercial and subsistence fishing gear shall not be placed in a manner that completely blocks or entirely prevents the free passage of fish into and out of streams that flow into 1836 treaty waters (CORA 2009). Weirs and traps are designed to be placed in these types of locations; therefore, this method is not as productive as the more common methods of netting and angling. However, the use of weirs and traps are permitted methods of subsistence fishing (CORA 2009).

### 2.1.3 Fish Spears

Unlike nets or traps, spearing was employed to harvest fish individually. Fish spears were used throughout the entire Great Lakes and Ohio River and Upper Mississippi River Basins (Rostlund 1952). They had many specialized uses in the Native American culture and continue to be used today. Three different kinds of fishing spears are utilized: spears, harpoons, and leisters. Traditional spears had straight shafts made of wood with pointed bone or antler hooks securely hafted onto the shaft. Spears would be used on larger fish in shallow water. Harpoons are barbed

Drying and smoking of fish was a common method of preserving fish, to make the catch from special fishing expeditions ready for transport and also to make the fish easier to store for winter consumption (Tooker 1991). Fish were hung to dry in the sunlight or in an airy spot. The fish could also be placed on a rack over a slow fire to dry. The fish were dried until they were hard and then packed in layers to be stored (Densmore 1979). Fish were smoked by being placed over smoldering fires. During winter, the fish would be frozen without cleaning. This practice was common in the Great Lakes and Upper Mississippi River regions (Rostlund 1952) and is still practiced today (Newago 2011).

Sometimes the Chippewa, who were located near Lake Superior, would remove the fish from the fire before it was dried. They would then remove the skin and bones and spread the fish on birch bark to be dried more thoroughly. Once the fish was dried, it would be rubbed by hand until the flesh was very soft and fine. It was then mixed with maple sugar and eaten with a spoon; this dish was considered a delicacy (Densmore 1979).

It was an Iroquois tradition to make use of decayed fish. The fish would be hung without removing the viscera and left for months to decay. It would then be chopped and added to soup or cornmeal as a seasoning. The flesh of fish was also pounded or pulverized into meal, which would be stored for future use as a flavoring. The Iroquois would also utilize the bones, by grinding them up into bone meal, and also some of the entrails, and add them to other food for flavor (Tooker 1991).

Today, fish are still smoked, but not for preservation purposes. Fish are often frozen in modern freezers for future use (Plucinski 2011).

## 2.2 PLANT RESOURCES

Native Americans traditionally harvested plant resources for a variety of uses, including their use as raw materials for making fishing gear. Plants have many uses — from food, medicine, and charms to dyes and decorative arts. For instance, the Chippewa believed plants were given to them by the Creator and that without them, life would not be sustainable. Native American fishers in both the Algonquin and Iroquois groups were thus accustomed to using a variety of plants to eat with their catch and as raw material for fishing equipment.

Tobacco was also extremely important to the Native American groups and utilized in many different ways (see Section 6). Tobacco was offered to the Creator before leaving on any hunt, when the first animal was caught, and before game was consumed by the tribe. The Chippewa, for instance, smoked the root of aster or stalwart to attract game, and they smoked the root tendrils of purple stem aster or swamp aster with tobacco to attract game (Densmore 1974). The Iroquois believed that the burning of tobacco was the only way to talk to the Creator (Morgan 1962 [1851]).

Other plants, such as calamus and wild sarsaparilla, were used by the Chippewa during rituals. The roots of these plants were dried and grated finely to make a decoction of the two. The

### 3 PRESENT-DAY SUBSISTENCE PRACTICES OF TREATY TRIBES

Present-day fishing practices spring from traditional tribal world views. The Lake Superior Chippewa or Ojibwe see themselves as the “People of the Water.” Their culture is tied to the waters that have provided sustenance from fish and wild rice and have served as highways for travel, communication, and trade. The tribes consider their homeland to be sacred, with intangible, intrinsic, and spiritual value (Balber 2011; Leoso 2011).

According to their traditional beliefs, the Chippewa were created to fit in their current homeland, as were the indigenous plant and animal species of the area. The Creator has tasked them with a responsibility for stewardship over the lakes and shores of their homeland, and the waters are believed to have a spirit. The Chippewa therefore seek both spiritual and physical sustainability in the use of water resources, and at Native American hatcheries, only native species are to be released into the lakes and streams (Abel 2011; Moore 2011; Wilson 2011). Special water ceremonies are conducted at the beginning and end of each fishing season.

The treaties concluded between the various tribes and the United States in the late 18th and mid-19th centuries allowed some tribes to retain their hunting, fishing, and gathering rights on the lands they ceded to the government. Under these treaty rights, tribes engage in both commercial and subsistence fishing. The tribes recognize the importance of maintaining a sustainable resource and of regulating and monitoring treaty-based harvesting. As previously noted, the percentage of the tribe directly involved in subsistence harvesting is often small. However, the effects of even a small number of harvesters ripple through the community, because subsistence harvesters typically share their take with family and friends and with the elderly and others unable to fish. In a small community, members usually know who is in need of food assistance (M. DeFoe 2011; Newago 2011).

Subsistence harvesting of fish, animals, and plant resources continues in these ceded areas. The courts have generally ruled that tribes may continue to use traditional methods of harvesting. Traditional methods of fishing still in use are gill nets, seine nets, spear fishing, angling, and, reportedly, catching by hand (M. DeFoe 2011; Newago 2011). Tribal subsistence fishing methods are regulated by individual tribes and inter-tribal organizations in that there are seasons and limits for certain species of fish. The species of fish that are regulated are watched closely due to their popularity with subsistence fishers and the risk of over-fishing within the ceded territories. Traditional fishing methods utilized within the ceded territories are also highly monitored by each tribe’s fish and wildlife divisions, inter-tribal organizations, and each state’s department of natural resources, because they have the potential to capture many fish at once, which could eventually deplete the species and lead to an ecological imbalance. The intertribal organizations discussed below help in monitoring fishery health and harvesting methods, such as spearing and netting. These are high-profile methods and must be well accounted for, since spearing and netting are not legal methods of fishing for non-tribal members or for tribal members from outside the ceded territories.

The number of fish harvested by other methods is less important with regard to fishery management, since these methods do not target a specific species and since the amount of fish

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### **3.1.4 Sault Ste. Marie Tribe of Chippewa Indians of Michigan**

The Sault Ste. Marie Tribe of Chippewa Indians of Michigan is a member of CORA and is permitted to engage in subsistence fishing in the treaty-ceded waters regulated by CORA. The Sault tribe has a Conservation Committee that acts as a regulatory agency over the fishing and hunting activity of tribal members. The Sault tribe also has treaty fishing rules and regulations to achieve compliance with the 2007 Inland Consent Decree and provide a system of self-regulation of tribal members' inland Article 13 Rights (Sault Ste. Marie Tribe of Chippewa Indians 2010).

The Sault tribe's Natural Resource Department has an intertribal fisheries and assessment program that operates under three main focus areas. The Great Lakes fisheries management operation provides commercial and subsistence catch statistics to comply with reporting obligations, conducts field studies to assess status of fish populations in the 1836 Treaty-ceded waters of the Great Lakes, analyzes catch and assessment data to determine population status, undertakes research, and develops programs to enhance treaty fishing opportunities and represent the Sault tribe on CORA's Technical Fisheries Committee. The Great Lakes environmental operation addresses environmental issues that are related to the Sault tribe's Great Lakes fishery interests. Work includes conducting fish contaminant studies and participating in educational activities. The fisheries enhancement operation runs and maintains two walleye fish hatcheries. It also conducts research and assessments related to fish stocking programs and manages nontraditional fish species (Sault Ste. Marie Tribe of Chippewa Indians 2011).

In 2010, the Sault tribe issued 3,028 inland fishing licenses, and 43% of the license holders reported fishing efforts in 2010. The licenses cover all types of inland fishing; however, every tribal member has the right to subsistence fish under the 1836 Treaty. The annual harvest report is broken down into the most common species captured over the entire 1836 ceded territory. The requirements of the 2007 Inland Consent Decree do not mandate that specific water bodies be reported; however, some of the spearing activity is reported, by lake. The most common species reportedly captured in 2010 were rainbow, brook, and brown trout; coho, Chinook, and pink salmon; walleye; muskellunge; pike; perch; bluegill; sucker; smelt; and sturgeon (Clarke 2010).

### **3.1.5 Bay Mills Indian Community**

The Bay Mills Indian Community (BMIC) is a member of both CORA and GLIFWC. The Bay Mills Indian Community tribal members are permitted to fish, hunt, and gather in the treaty-ceded waters and lands regulated by these agencies.

The BMIC has a Conservation Committee, started in 1979, that was given authority and responsibility for regulations pertaining to hunting, fishing, and trapping. The Conservation Committee works with federal enforcement agents, officers of GLIFWC, officers of CORA, and enforcement officers of a tribe with whom the BMIC has entered into a cooperative agreement (BMIC 2004). The role of the Conservation Committee is to issue fishing licenses, regulate seasons (there is either a season or no season for fishing provided in order to preserve the resource), set limits on the resource for conservation purposes, review permits and licenses each



harvest fish on the Great Lakes. Most of the subsistence fishing that takes place on inland waters occurs on the Ontonagon River watershed, where 90% of the harvested fish are walleye, with some lake trout harvested from the inland lakes (Beck 2011).

**TABLE 3.5 Species Harvested in the 2005–2009 Wisconsin Spring Spearing Season from Connected Water Bodies**

Name	County	Species Harvested
Mineral Lake	Ashland	None
Diamond Lake	Bayfield	Walleye, bass, northern pike
Hart Lake	Bayfield	None
Lake Millicent	Bayfield	None
Muskellunge Lake	Bayfield	None
Pike Lake	Bayfield	Walleye, muskellunge
Siskiwit Lake	Bayfield	None
Twin Bear Lake	Bayfield	Muskellunge
Big Trade Lake	Burnett	None
Round Lake	Burnett	None
Lake Minnesuing	Douglas	Walleye
Lake Nebagamom	Douglas	Walleye
Crane Lake	Forest	Walleye
Lake Lucerne	Forest	Walleye, smallmouth bass
Lake Metonga	Forest	Walleye, northern pike
Mole Lake	Forest	Walleye
Pickerel Lake	Forest	None
Pine Lake	Forest	Walleye
Roberts Lake	Forest	Walleye
Windfall Lake	Forest	None
Boulder Lake	Langlade	None
Lower Post Lake	Langlade	None
Pickerel Lake	Langlade	None
Rolling Stone Lake	Langlade	Walleye
Rose Lakes	Langlade	Walleye
Upper Post Lake	Langlade	Walleye
White Lake	Langlade	None
Lake Nokomis	Oneida	Walleye, muskellunge
Upper Post Lake	Oneida	None
Balsam Lake	Polk	Walleye, largemouth bass, northern pike
Big Butternut Lake	Polk	Walleye, largemouth bass
Big Round Lake	Polk	Walleye, largemouth bass, small mouth bass, northern pike
Bone Lake	Polk	Muskellunge, largemouth bass, smallmouth bass
Cedar Lake	Polk	None
Deer Lake	Polk	Muskellunge, largemouth bass
Half Moon Lake	Polk	Walleye, largemouth bass
Magnor Lake	Polk	Walleye
Wapogasset Lake	Polk	Walleye

Source: Krueger (2006, 2007, 2008, 2009, 2010)

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the ceded territories, including Mille Lacs Lake, the largest inland lake in the ceded territories (Howes 2011).

### 3.3 1854 TREATY AUTHORITY

The 1854 Treaty Authority is an intertribal natural resource management organization that manages off-reservation hunting, fishing, and gathering rights in the territory ceded under the Treaty of 1854. Member tribes are the Grand Portage and the Bois Forte Bands of Lake Superior Chippewa Indians (1854 Treaty Authority no date.) (Table 3.6).

**TABLE 3.6 1854 Treaty Authority Member Tribes**

Tribes	Practice Subsistence Fishing in Study Area?
Grand Portage Band of Lake Superior Chippewa Indians	Yes
Bois Forte Band of Lake Superior Chippewa Indians	No

The Natural Resource Department of the 1854 Treaty Authority is involved in research and management of fish populations within the 1854 ceded territory. The department focuses on walleye management, and its work is done in cooperation with the Fond du Lac Band of Lake Superior Chippewa Indians and the Minnesota Department of Natural Resources (1854 Treaty Authority no date).

The Grand Portage Band of Lake Superior Chippewa Indians is the only tribe under the 1854 Treaty Authority that harvests fish for subsistence use within the study area. The Bois Forte Band is outside the Upper Mississippi River Basin and the Great Lakes Basin. The Grand Portage Band has a Natural Resource Department that monitors fish and wildlife and that operates a fish hatchery. Figure 3.4 shows the rivers and streams within the 1854 ceded territory that are allowable for subsistence fishing. Members of the Grand Portage Band practice subsistence fishing in the Grand Portage Zone of Lake Superior (Figure 3.5). Tribal members may fish in any water body that has public access within the ceded territories. The methods most commonly used are gill netting and angling. The species most commonly targeted are lake trout, brook trout, menominee (round whitefish), whitefish, cisco (which includes chubs and herring), walleye, and pike (Moore 2011) (Table 3.2). No reporting of subsistence fish catches is required.

The Grand Portage Band also operates a fish hatchery, which stocks inland lakes and the Grand Portage Zone of Lake Superior. The indigenous species raised and stocked by this hatchery are brook trout, lake whitefish, and lake herring (Moore 2011).

## 4 PRESENT-DAY SUBSISTENCE PRACTICES OF NON-TREATY TRIBES

Although historically, subsistence fishing was an important way of life for most of the Native American tribes in the study area, many tribal groups have faced challenges in keeping this tradition active. The tribal groups that are not party to treaties that reserve hunting and fishing rights do not have enough access to waterways to allow them to continue their traditional subsistence practices. Many of the streams and lakes that are available to them (either streams and lakes on their reservations or inland lakes that they have purchased for fishing) have been contaminated. Many of the tribes are also near metropolitan areas, where it is an ongoing challenge to keep the youth interested in traditional ways of life. Youth are increasingly involved in modern American culture and economic systems, and are less reliant on subsistence harvesting to acquire food for their families.

### 4.1 NON-TREATY TRIBES THAT PRACTICE SUBSISTENCE FISHING

There are five tribes within the study area that were available for interviews and that practice subsistence fishing on their tribally owned land. Table 4.1 lists the non-treaty tribes that practice subsistence fishing. The subsistence fishing activities of each of these tribes are described in Sections 4.1.1 through 4.1.5.

#### 4.1.1 Notawaseppi Huron Band of the Potawatomi

The Notawaseppi Huron Band of the Potawatomi is located on Pine Creek Reservation, which is in southwestern Calhoun County in Michigan. The tribal members do not rely solely on their fishing efforts for food; however, they capture fish to supplement their diets. The Nottawa Creek watershed, which is connected to Lake Michigan via the St. Joseph River, is where tribal members can fish for suckers and northern pike within the reservation. Wild rice is also grown and harvested on Nottawa Creek. Tribal members also fish on publicly owned state land under the State of Michigan's fishing regulations (Rodwan 2012).

The Kalamazoo River is another place where tribal members subsistence fished; they did so until 2010, when one of the largest Midwest oil spills occurred. An Enbridge pipeline burst

**TABLE 4.1 Non-Treaty Tribes That Practice Subsistence Fishing**

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Notawaseppi Huron Band of the Potawatomi
Stockbridge-Munsee Community
Saginaw Chippewa Indian Tribe of Michigan
Seneca Nation of Indians
St. Regis Mohawk Tribe

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Most of the tribal members, who do not live on the reservation, live in the metropolitan areas (Whitt 2012).

#### 4.2.3 Scattered Land Base

The Ho-Chunk Nation has a situation that is unique when compared with that of other tribes in the study area. Its tribally owned lands are scattered throughout 20 counties in Wisconsin, Minnesota, and Illinois. If the members fish, they do so under each state's regulations. The Ho-Chunk Nation has a Natural Resources Department that focuses on conservation, preservation, and protection of natural resources on all tribal lands. Its efforts focus on wildlife: endangered resources, outreach and education, animal surveys, inventories of all of its lands to ensure their cultural and natural resources are protected and managed, and forestry management (Ho-Chunk Nation 2008).

### 4.3 NON-TREATY TRIBES UNAVAILABLE FOR INTERVIEWS

Several tribes within the study area were either unavailable for interviews or were hesitant to share information about their subsistence practices (see Appendix A for Tribal Contact Efforts). Table 4.3 lists the tribes that are not under treaty rights and that Argonne National Laboratory was not able to contact. No information is known about the subsistence practices of these tribes.

**TABLE 4.3 Non-Treaty Tribes  
Unavailable for Interviews**

---

Sac and Fox Tribe of the Mississippi in Iowa
Menominee Indian Tribe of Wisconsin
Hannahville Indian Community
Pokagon Band of Potawatomi Indians
Forest County Potawatomi

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information on the production cost of generic subsistence fishing activities for a representative single household based on the limited data that was gathered through the interview process, rather than provide estimates of the value of all subsistence activity in Michigan, Wisconsin, and Minnesota. In addition, as cost data received were not specific to particular species of fish, the analysis does not value subsistence activities with respect to individual species of fish; only the cost of participating in subsistence fishing activity as a whole.

Tribes fish for subsistence purposes primarily using gill nets or spears. Gill nets are either purchased ready-made (a 300-foot net of 4.5-inch mesh costs between \$280 and \$350) or sewn from materials purchased in fishing tackle stores (Newago 2011). Handmade nets are made of monofilament, and a 300-foot net costs about \$180. Although commercial fishers hand-sew their own nets, subsistence fishers usually buy theirs. Most subsistence fishermen have one or two 300-foot nets (Moore 2011; Deschampe 2011). Spearfishing requires waders and spears. A homemade spearhead is usually used; purchased spearheads cost between \$15 and \$20 (Plucinski 2011). In addition to fishing, many tribal reservations harvest the wild rice plots they have on inland lakes. Rice is harvested by using a canoe, handmade cedar beaters, and a push-pole, which costs about \$50 (Howes 2011). The canoe is usually towed to the rice stands by a boat with an outboard motor. Although some tribal members may use small non-motorized fishing craft for subsistence fishing, most subsistence fishing occurs in small motorized craft. Although no data were provided on the cost of boating equipment, it was assumed that boat purchase cost was \$2,000, and that the cost of fishing equipment and would be depreciated over a 20-year period.

The cost of fuel used for trips to fishing locations and for the fishing activities themselves is relatively small. Fishing takes place either close to shore in one of the Great Lakes or onshore in tributaries that run into the Great Lakes. Subsistence nets are typically placed within 300 feet of the shore and gathered from 14- or 16-foot skiffs with outboard motors (Plucinski 2011). Fuel consumption is about six gallons over a two-day fishing period, meaning that a two-day subsistence fishing trip would cost \$21 in fuel, assuming gasoline costs of \$3.50 per gallon (Gasbuddy.com 2011). Although interviews indicated that the number of hours in any given subsistence fishing trip varied, evidence from Alaska suggests that households participated in subsistence for an average of about nine weeks per year (TetraTech 2011), and these data are utilized for the analysis of subsistence valuation in Michigan, Wisconsin, and Minnesota. Assuming each subsistence trip would last two days, there would be approximately 42 trips each year made by an individual household. It is assumed that participation in subsistence occurs during time that might otherwise be used for wage-earning employment, meaning an average of 160 hours were available for subsistence activities per month, and that one person per household would otherwise be working during the time used for participation in subsistence.

Data from interviews indicate that tribal subsistence fishing travel costs for residents who live on tribal lands are small, as they typically do not include lodging costs or camping fees. While it is recognized that some tribal members may have to travel longer distances to subsistence fishing locations, and may have higher travel costs, including lodging, for the purposes of the analysis, it was assumed that subsistence fishing activities would mean a 25-mile round trip. It was assumed the trip would be in a vehicle with gas consumption of 25mpg, and although it was assumed that vehicles used for subsistence activities were not

Ceremonies or rituals are still a common practice today. Some groups of Chippewa conduct water ceremonies in the traditional Midé religion before the fishing season commences and at the close of the fishing season (Leoso 2011). Songs are also sung to and for the water spirit (Leoso 2011). Individual fishermen give thanks and pray while offering tobacco to the water spirit (L. DeFoe 2011). Fishing characters in stories are part of the traditional religion, and the stories are passed down orally from generation to generation (M. DeFoe 2011).

## 6.2 IROQUOIS

The beliefs of the Iroquoian people are based on the “Great Cycle of All Things” (Williams 2007). It is believed that all things have life and exercise will. All phenomena, all emotion, all changes, and all activity are interpreted as the results of the exercise of supernatural power directed by the Creator (Hewitt 1974). Most of the objects in nature are believed to have their own spirit that provides invisible aid to the Creator (Morgan 1962 [1851]).

Tobacco, for instance, played an important role in the Iroquoian society. The tribes believed that tobacco was given to them as the means of communications with the spiritual world. Tobacco would be burned and an invocation offered to the Creator. In this manner, the Iroquois could send up their thanks and petitions to the Creator with the tobacco smoke (Snow 1994). The many feasts that were held represented the Iroquois giving thanks to the aids of the Creator for their ministering of the Iroquois peoples’ wants (Snow 1994).

Rituals were often enacted to please the Creator’s invisible helpers and to bring about good fortune. Tobacco would also be placed in the water for the soul of the water spirit, who was an invisible aid to the Creator (Rostlund 1952). A fish preacher would be available to preach a sermon to the fish; he had a special gift in that he could speak directly to the fish and tell the fish about the purpose they would be serving by allowing themselves to be caught. The Iroquois believed that this preacher had the power to attract the fish into the nets (Rostlund 1952).

The Iroquois would also sing songs and give humorous speeches to the fish to attract them into the nets. It was believed that fish bones and fish were never to be thrown into the fire because the other fish would hear of this action and not let themselves be caught (Rostlund 1952).

## 6.3 SENSITIVE AREAS AND RELIGIOUS SITES

According to members of the Chippewa bands, their entire homeland is sacred. They believe they were created to fit into their homeland, and they were placed there by the Creator to protect its resources; thus, the intrinsic value of water defines them as a people (Plucinski 2011; Newago 2011; Pavlat 2011; Leoso 2011). Subsistence fishing is a way of life to the Great Lakes tribes and always has been since their migration story brought them here hundreds of years ago. They believe that having this resource, having the right to use this resource, and being good stewards of this resource are why they were brought to this place. When the tribal members’ ancestors signed the treaties, they had no concerns over land ownership. They lived their lives by

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**APPENDIX:**  
**TRIBAL CONTACT EFFORTS**

Tribe	Contact	Visit	Summary
Grand Portage Band of Lake Superior Chippewa Indians	Seth Moore – Fish and Wildlife Biologist Norman Deschampe – Chairman	Yes	Tribal contacts were visited on 11/29/2011. Subsistence and commercial data and cultural information were received.
Bois Forte Band of Lake Superior Chippewa Indians	Corey Strong – Department of Natural Resources Commissioner	No	Tribal contact was emailed on 9/22/2011. Tribe does not do commercial or subsistence fishing within project study area.
Fond du Lac Band of Lake Superior Chippewa Indians	Thomas Howes – Natural Resources Program Manager Leroy DeFoe – Tribal Preservation Officer	Yes	Tribal contacts were visited on 11/31/2011. Subsistence data and cultural information were received. Tribe does not commercial fish.
Mille Lacs Band of Ojibwe	Kelly Applegate – Wildlife Biologist	No	Tribal contact was spoken to on phone. He was hesitant to give any information on location of fishing waters and species targeted.
St. Croix Chippewa Indians of Wisconsin	Don Taylor – Natural Resources	No	Tribal contact was emailed on 10/10/2011 and spoken to on 2/7/2012. Tribe does subsistence fishing in St. Croix River System, Mille Lacs Lake, and small lakes and streams within northwest WI.
Lac Courte Oreilles Band of Ojibwe	Paul Christal – Fisheries Biologist	No	Tribal contact was spoken to on phone on 9/29/2011 and on 2/13/2011. Tribe exercises its treaty rights throughout the ceded territories. There is no reporting.
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin	Chad Abel – Division Program Manager Bryan Bainbridge – Natural Resources Department Marvin DeFoe – Vice-Chairman Charles Newago – Subsistence Fisher	Yes	Tribal contacts were visited on 10/25/2011. Subsistence and commercial data and cultural information were received.

Tribe	Contact	Visit	Summary
Nottawaseppi Huron Band of the Potawatomi	John Rodwan -- Environmental Director	No	Tribal contact was made on 1/31/2012. Subsistence fishing takes place on reservation waters. Not regulated. Tribes do not need fish to survive; fishing is done more to supplement their diets.
Forest County Potawatomi	Natural Resources Department	No	Tribal contact was not able to be made. Multiple attempts were made by phone.
Stockbridge-Munsee Community	Randall Wollenhaup -- Fish and Wildlife Biologist	No	Tribal contact was made on 1/31/2012. Tribe subsistence fishes on tribally owned land. Not regulated. If members did not fish, they would not be able to buy fish to supplement their diets.
Saginaw Chippewa Indian Tribe of Michigan	Don Seal -- Planning Director	No	Tribal contact was made on 2/1/2012. Tribe subsistence fishes on reservation land and land owned by the state. Not regulated.



U.S. Environmental Protection Agency | National Tribal Caucus

# NATIONAL TRIBAL CAUCUS

NTC Priorities for the New Administration

UPDATED OCTOBER 2017

# NATIONAL TRIBAL CAUCUS

## NTC Priorities for the New Administration

Updated October 2017

## NTC Priorities for the New Administration

### National Tribal Caucus

The National Tribal Caucus (NTC) is a national body of tribal advisors who work to identify and address urgent or emerging tribal environmental issues across Indian country. The NTC's mission is to ensure sovereign tribal nations can protect human health, traditional lifeways, and the environment. This document was developed to initiate dialogue with the new Environmental Protection Agency (EPA) administration.

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### Who We Are

There are 567 federally recognized American Indian tribes and Alaska Native villages (collectively tribe/tribal) in the United States, with trust lands comprising over 56 million acres, 4% of the U.S. land base, and a combined population of approximately 4.5 million. While each tribal community is different in terms of land base and membership, governance structures, cultural practices, and environmental needs and priorities, there are important commonalities. For example, the quality of the environment in Indian country is of critical importance because it affects human health and the natural world is an integral part of our subsistence, cultural, ceremonial, and other traditional practices. We rely upon healthy and safe ecosystems to sustain our health, traditional lifeways, treaty rights, and ceremonial and cultural practices; however, those of us who depend on subsistence practices are disproportionately exposed to contaminated fish and wildlife. The generally rural and remote location of most tribal communities result in increased costs for basic goods and services and make the development and maintenance of needed infrastructure extremely expensive. These locations also make our lands more vulnerable to the impacts of drought, fire, and flood that have caused significant changes in our environment.

Compared to the rest of the country as a whole, the economic, health, and environmental conditions in our communities remain dire. Despite the economic success of a few high-profile tribes, nearly one-third of tribal homes remain at or below the poverty level (the highest level of any ethnic group in the United States). The rates of tuberculosis, pneumonia, influenza, and other environmentally based illnesses among tribal people are significantly higher than among non-Indian U.S. residents. A tribal home is 12 times more likely than a non-tribal home to lack access to safe drinking water and basic sanitation, with as many as one in four homes continuing to lack plumbing, sinks, or toilets in some of our communities.

Many tribal governments are responding to these complex, serious challenges with well-managed, cost-effective environmental programs that reinforce tribal sovereignty, protect important resources, and underscore the value of tribal self-determination. But there remain vast unmet needs.

## NATIONAL TRIBAL CAUCUS

### NTC Priorities for the New Administration

Updated October 2017

## Key Messages

The NTC identified the following key messages as focus areas to guide dialogue with the new EPA Administration.

- **Reaffirm and ensure the continued implementation of EPA's 1984 Indian Policy** to reflect the Agency's continued recognition of the sovereignty and primary environmental management role of tribal governments, as well as the role of EPA's program managers in implementing the federal trust responsibility and required government-to-government relationship with American Indian tribes and Alaska Native villages.
- **Hold harmless all programs that support tribal environmental protection efforts**, and, in particular, tribal allocations and set-asides of STAG programs. The proposed 30% cuts to various STAG program funding levels, and the proposed elimination of other programs upon which tribal communities rely, would have devastating effects to human health and the environment in and around Indian country.
- **Maintain and strengthen interagency efforts**, such as the Federal Infrastructure Task Force, whose collaborative work with tribal representatives serves to maximize efficiency in the use of limited resources from multiple federal agencies to address tribal drinking water, wastewater, and waste management needs.

## Program Priorities

The NTC outlined nine program priorities, as summarized in this section. Each priority area is then detailed in the remaining sections of this report.

- **Ensure tribal communities' access to safe drinking water and basic sanitation.** A significant disparity continues to exist with respect to tribal communities' access to safe drinking water and basic sanitation, while State Revolving Fund Tribal Set Asides receive only a fraction of the available funding. Additional funding is needed to address this critical human health issue, but these programs must at least be maintained at 2010 funding levels.
- **Protect the Indian Environmental General Assistance Program (GAP) and ensure its efficient implementation.** GAP is the primary source of funding for core tribal environmental programs and the "go-to" source of funding for many media-specific issues, such as air quality and solid waste management, where funding is inadequate or unavailable through other programs. It is critical that GAP funding, at a minimum, remain at current levels, and that tribes have sufficient flexibility to use those funds to address our highest priority environmental needs, including solid and hazardous waste program implementation, as provided in the GAP statute.
- **Protect tribal water – a precious and limited resource.** Tribal water programs protect one of our most precious resources needed to support human life, subsistence and cultural practices, and habitats. Clean Water Act 106 and 319 funding programs are critical to this effort. The tribal allocations of these programs must be held harmless from the proposed 30% reduction, with funding floors maintained at FY 2010 levels.
- **Protect air quality in Indian country.** Tribal communities suffer disparate impacts from air pollutants, such as mercury, due to our traditional lifeways and subsistence practices. Tribal air programs serve key functions as co-regulators in the assessment, monitoring, data-sharing, and management of regional air quality. Tribal allocations of Clean Air Act 103 and 105 funding programs are critical to this effort and must be held harmless from the proposed 30% reduction.
- **Support tribal efforts to adapt to changing environments.** Regardless of the cause, observable changes in climate and associated changes to the environment have significant impacts on tribal communities, such

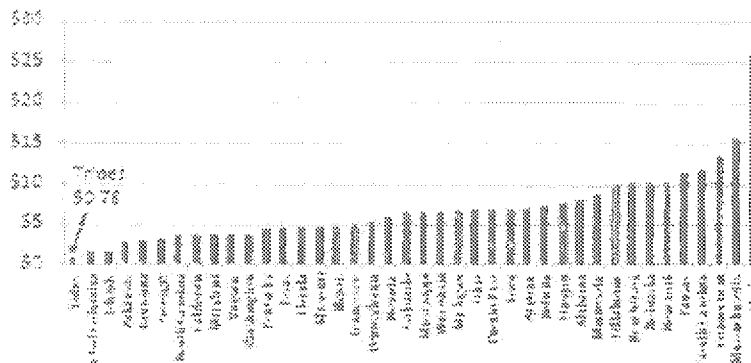
## NATIONAL TRIBAL CAUCUS

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#### FY 11 Drinking Water SRF Funds for \$100 of Need

➤ Tribes have less funds to address needs



Source: <http://water.epa.gov/infrastructure/drinkingwater/dwn/index.cfm>

Figure 2. Drinking Water State Revolving Fund (DWSRF) Allotments based on the 2011 Drinking Water Infrastructure Needs

percentage of homes lacking access to safe drinking water and basic sanitation for tribal areas compared to the U.S. population based on 2000 Census data. Figure 2 shows the Drinking Water State Revolving Fund (DWSRF) allotments based on the 2011 drinking water infrastructure needs survey assessment results, showing tribes have less funds to address needs.

It is important to note that the various infrastructure funding programs administered by EPA, IHS, U.S. Department of Agriculture (USDA), and Department of Housing and Urban Development (HUD) are not duplicative; rather, each serves different purposes and prioritizes for funding different issues, communities, and project sizes. For instance, the Clean Water Act and Safe Drinking Water Act State Revolving Fund Tribal Set-Asides are not authorized to be used for new construction, and IHS funds are allocated based on a priority system that may prevent small communities or those that are not densely clustered from ever receiving funding. USDA water and wastewater programs and HUD's Community Development Block Grant programs serve to fill gaps in funding and are critical to ensure tribal access to safe drinking water and basic sanitation.

representatives, the multi-agency Federal Infrastructure Task Force<sup>1</sup> developed a series of recommendations to address infrastructure and ongoing operation and maintenance needs in tribal communities,<sup>2</sup> several of which have been implemented. Numerous tribal projects were also funded under the American Recovery and Reinvestment Act of 2009.<sup>3</sup> But there is more work to be done to meet the Congressional goal of ensuring that all tribal homes are given access to safe drinking water and basic sanitation as soon as possible.<sup>4</sup>

The most recent IHS Report to Congress indicates that, as of the end of 2016, nearly \$3.4 billion is needed for infrastructure projects to provide and maintain access to safe drinking water and basic sanitation in all tribal homes. Figure 1 shows the

<sup>1</sup> Composed of representatives from the US Department of Agriculture – Rural Development; US Environmental Protection Agency; US Department of Health & Human Services (Indian Health Service); US Department of Housing and Urban Development; and US Department of the Interior (Bureau of Indian Affairs).

<sup>2</sup> Meeting the Access Goal: Recommendations to Increase Access to Safe Drinking Water and Wastewater Treatment to American Indian and Alaska Native Homes (March 2008)

<sup>3</sup> PL 111-5, 12 Stat 124 (Feb 17, 2009)

<sup>4</sup> 25 USC § 1632(a)(5)



## NATIONAL TRIBAL CAUCUS

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## Protect Tribal Water – A Precious and Limited Resource

Tribal water programs protect one of the most precious resources needed to support human life, subsistence and cultural practices, and habitats. With 13% of the nation's watersheds located in Indian country and most of the nation's remaining pristine waters and habitats under tribal jurisdiction, tribal programs are just as much on the front line of water quality protection efforts as state programs, but tribal programs are primarily located in rural and remote geographical areas where goods and services may cost more for transportation and access. Nonetheless, there has been a continued significant disparity between the amounts of grant funding made available to tribes, as compared with states, to perform much of the same kind of work.

Clean Water Act Sections 106 and 319 funding programs are critical to tribal efforts to protect water resources. Section 106 funding (see Figure 4) is the primary source of support for core tribal water program functions, including staffing, administration, monitoring, and basic water pollution control activities, as well as for the development and implementation of delegated authorities, such as water quality standards under the Clean Water Act. Without adequate Section 106 funding that can be relied on consistently into the future, tribes will be unable to realistically plan for future program activities, maintain staff, or implement federal Clean Water Act responsibilities, which we understand to be a primary goal of EPA, as it is for many tribes.

Section 319 program funding (see Figure 5) has served the critical function of supporting tribal efforts specifically focused on nonpoint sources of pollution, which impact 80% of waters that have been assessed according to the latest draft National Program Managers Guidance issued by the Office of Water. Because these pollution sources are not as well-regulated as point sources of water pollution and are more likely than point source pollution to occur in rural and remote areas, which constitute the majority of Indian country, support for tribal nonpoint source management programs is critical. The Section 319 program not only offers base funding to support staffing, administration, and fundamental tasks associated with nonpoint source management, it also funds larger collaborative projects that have wide-ranging benefits.

No other funding program administered by EPA or any other federal agency offers the same level of support to tribal nonpoint source management programs, which means this program is not duplicative. To suggest that USDA funding can cover the range of nonpoint sources of pollution that tribal water programs are required to address ignores the inherent focus of USDA programs on the impacts of agricultural practices. Through the Clean Water Act, Congress has instructed that the Administrator shall make grants to support nonpoint source management programs (see 33 USC § 1329(h), (i)). As a result, it is not at all clear that it is within EPA's discretion to eliminate this important program; nor should EPA desire to do so, given the pervasiveness of nonpoint source pollution within and outside Indian country and the absence of other funding sources to address it.



## NATIONAL TRIBAL CAUCUS

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#### NTC Priorities

- The most effective way to ensure comprehensive protection of water quality throughout the country, in keeping with EPA's statutory responsibility, is to provide tribal water programs with adequate and consistent Clean Water Act Section 106 funding comparable to that made available to states *and* to maintain and adequately fund the nonpoint source pollution control program.

#### Protect Air Quality in Indian Country

Both ambient and indoor air pollution pose serious threats to human health and have been linked to an array of concerning health effects, such as asthma, congestive heart failure, diabetes, and decreased cognitive function. Tribal communities are more vulnerable to air pollution impacts than non-Indian populations in the United States, and they experience higher than average rates of these types of health ailments. In particular, tribal communities are at a higher risk of exposure to mercury and other air toxics through traditional lifeways, such as subsistence practices. Tribal families also continue to be exposed in disparate levels to a number of indoor air pollutants, such as those emanating from wood and coal heat sources, radon, mold, and lead.

Tribal governments are important co-regulators of air quality, working with federal, state, and local agencies to assess, monitor, and manage regional air quality. Air quality assessments, including emissions inventory development and monitoring and managing air quality are necessary to protect public health. Air quality monitoring in Indian country in general, is currently minimal, with little to no education or understanding of the health risks from lead, polychlorinated biphenyls, mercury, and radionuclides among tribal communities. Off-reservation sources of ozone precursors that cross-boundaries are not adequately monitored. Much of the existing air monitoring equipment used in Indian country is becoming obsolete and is no longer repairable.

Due to inadequate funding levels under Clean Air Act Sections 103 and 105, not all tribal governments that require air monitoring and other program activities to ensure the protection of health in their communities are able to obtain grants to develop or, in many cases, continue to operate their established air programs. Tribal grant applicants are often instructed to use GAP funding to support their unmet needs. An adequate and reliable source of funding is needed to ensure tribal air program staffing, training, equipment, and administrative tasks can be sustained.

#### NTC Priorities

- Increase funding for existing tribal air programs and air quality monitoring infrastructure.
- Create a new funding stream for tribes in vulnerable air sheds to establish air monitoring programs for the health and safety of their communities and environments.
- Support tribal training programs, such as the current work conducted by the Institute of Tribal Environmental Professionals.
- Create pilot projects for the use of new air sensor technologies.
- Increase technical support and funding for the Tribal Air Management Support (TAMS) Center, including support for proper staffing and new loaner equipment.
- Improve communication within EPA Regions and with tribal governments on Tribal New Source Review.
- Facilitate the coordination of easily accessible funding sources across multiple federal agencies, including IHS, HUD, USDA, and the Centers for Disease Control and Prevention, to support the implementation of solutions to tribal indoor air issues.
- Increase EPA staff to assist with technical support to address tribal indoor air issues, including Tribal Healthy Homes initiatives.
- Establish tribal set-aside funding mechanisms for indoor air quality programs.

## NATIONAL TRIBAL CAUCUS

### NTC Priorities for the New Administration

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## Protect Tribal Communities from the Harmful Effects of Improperly Handled Waste

Uncontrolled and unsafe waste disposal practices remain a critical human health and environmental concern in tribal communities. Solid and hazardous wastes cause numerous risks to human and environmental health, especially when improperly disposed. American Indian and Alaska Native peoples have a strong connection to the land, and through traditional hunting, fishing, cultural and subsistence practices, they are often disproportionately adversely affected by toxic releases to the environment. Wildlife, which is also extremely important to tribal communities for subsistence, ceremonial, and cultural practices, is affected through several means, including ingestion of or smothering by plastic packaging; exposure to contaminated water runoff; ingestion of contaminated waste; and bio-accumulation of dioxins, furans, and heavy metals. Rodents, birds, bears, and other vectors that carry disease affect humans and are often attracted to waste that is improperly disposed, exposing people to disease and contaminants.

Exposure to contaminants from solid waste occurs in many ways, including pollution of ground and surface waters, soil contamination, and air contamination from airborne particulates. Trash fires contribute significantly to global anthropogenic emissions of small particulate matter and mercury and polycyclic aromatic hydrocarbon emissions. Human exposure to poorly managed wastes can cause lung and neurological diseases, and it has been linked to heart attacks and some cancers.

Some of the most significant factors contributing to unsafe waste disposal practices in tribal communities include the lack of adequate and consistent funding sources to support the development and implementation of sustainable waste management programs, high costs and other challenges associated with the development and maintenance of adequate waste collection and disposal infrastructure in rural and remote areas, the absence of recycling programs and other waste diversion methods, and jurisdictional issues. These circumstances have led to the continued presence of open dumps in tribal communities. The situation has been exacerbated by the changing nature of materials that enter the waste stream, industry purchasing patterns, and significant impacts on the environment caused by the changing climate. Until these circumstances are addressed, poorly managed waste will continue to pose significant risks to human health and the environment, adversely affecting tribal communities and future generations.

### NTC Priorities

- Ensure GAP funds can be used for tribal solid and hazardous waste program implementation activities.
- Re-establish funding for solid and hazardous waste response and management, especially resources to develop and implement integrated sustainable waste management plans.
- Continue to participate on the Federal Infrastructure Task Force in collaboration with tribal and other federal agency representatives, and foster collaboration between tribal, federal, state, and local agencies on the regional level to address tribal waste management needs.
- Increase awareness of available technical assistance and compliance assistance, and support tribal governments in the development, implementation, and enforcement of their waste-related laws and regulations.
- Provide Comprehensive Environmental Response, Compensation, and Liability Act trainings.
- Develop a uniform plan for tribal governments to implement basic recycling and e-waste systems.
- Develop mechanisms with EPA that encourage and build tribal capacity to be involved in clean-up processes and activities.
- Consider Tribal Environmental Knowledge and tribal lifeway models in determining clean-up standards.

## NATIONAL TRIBAL CAUCUS

### NTC Priorities for the New Administration

Updated October 2017

## Achieve Environmental Justice by Supporting the Preceding Program Priorities and Ensuring Tribal Participation in Superfund and Brownfields Programs

As illustrated throughout this document, tribal communities continue to suffer significant disparity in environmental, health, and economic conditions compared with non-tribal populations across the country, yet they have access to significantly fewer resources than states do to address these conditions. By adhering to the principles set forth in the 1984 Indian Policy and working with tribal governments in a government-to-government context to implement the program priorities NTC has identified, EPA will demonstrate its commitment to achieving environmental justice in Indian country.

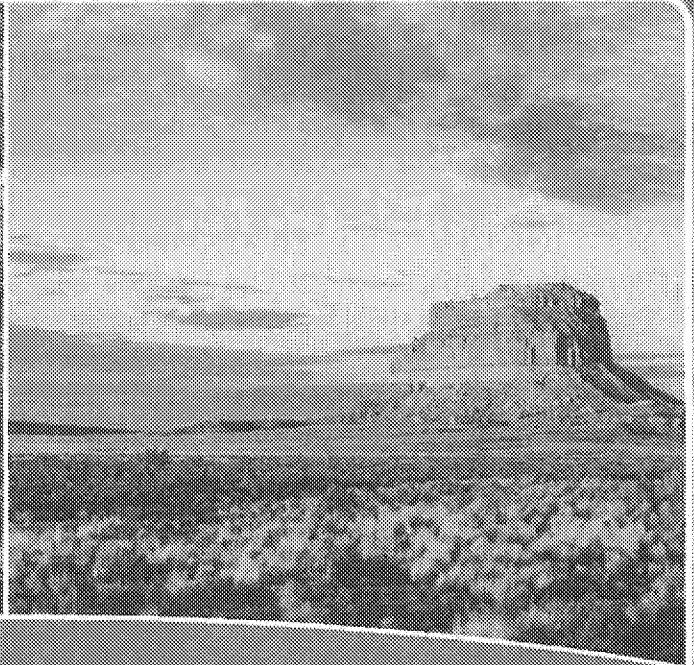
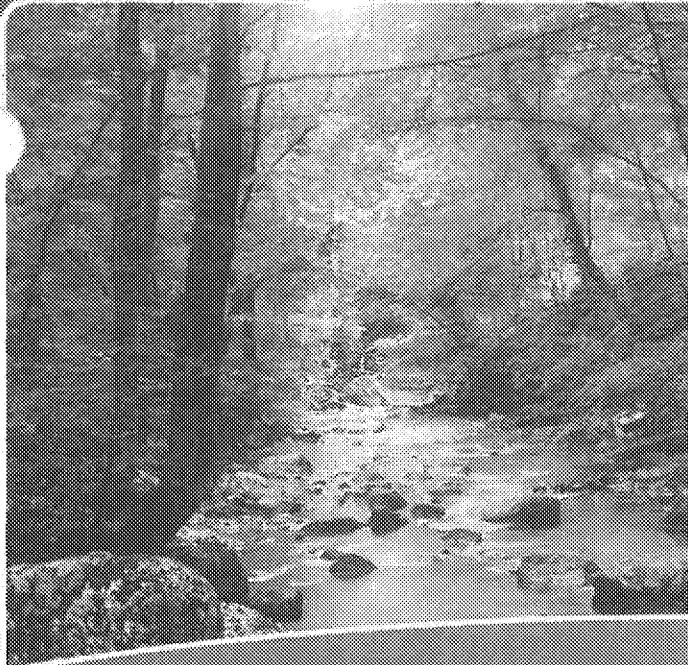
The Nevada Anaconda Mine sites illustrates the need for greater cooperative efforts to ensure that the tribal sovereign rights of the Yerington Paiute Tribe and the Walker River Paiute Tribe are protected. The deferral of the Anaconda Mine Site is problematic for both the Yerington Paiute Tribe and the State of Nevada. Concerns over jurisdictional oversight that the state will seek to exert would occur on tribal property and would need concurrence from the Yerington Paiute Tribe and the Walker River Paiute Tribe on all work that could affect tribal lands. These types of potential interactions would require the participation of EPA to mediate. The purpose of a deferral is to simplify a clean-up process, but should not cause jurisdictional infighting. A state-lead action on the Anaconda Mine Site would complicate the process, as it would interfere with and undermine tribal sovereignty if left unmediated by EPA.

### NTC Priorities

- Improve funding for tribal response programs for Brownfield sites, including those in Alaska.
- Improve outreach and training on the availability of cooperative agreements with tribal governments for Superfund sites.
- Notify tribal governments of National Priority Listings and the geographic location of sites in relation to tribal communities.
- Develop a national database that identifies Superfund sites in Indian country and in areas that have the potential to impact treaty rights and cultural resources.
- Consider Tribal Environmental Knowledge and tribal lifeway models in determining clean-up standards.

## Conclusion

The NTC looks forward to working with the new EPA Administration to preserve the integrity of tribal environmental programs. Through guided dialogue about these key messages and program priorities outlined in this document, it will lead to effective government-to-government partnerships that protect human health and the environment.

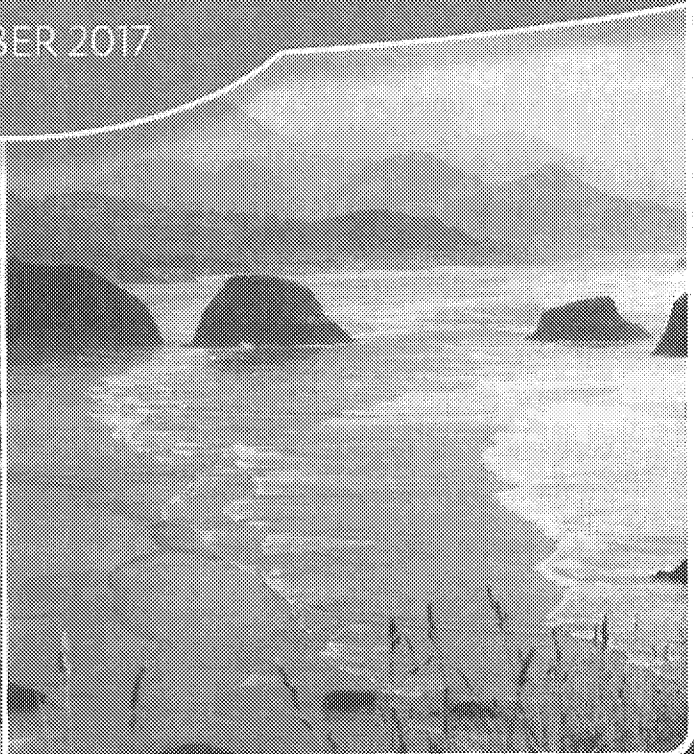
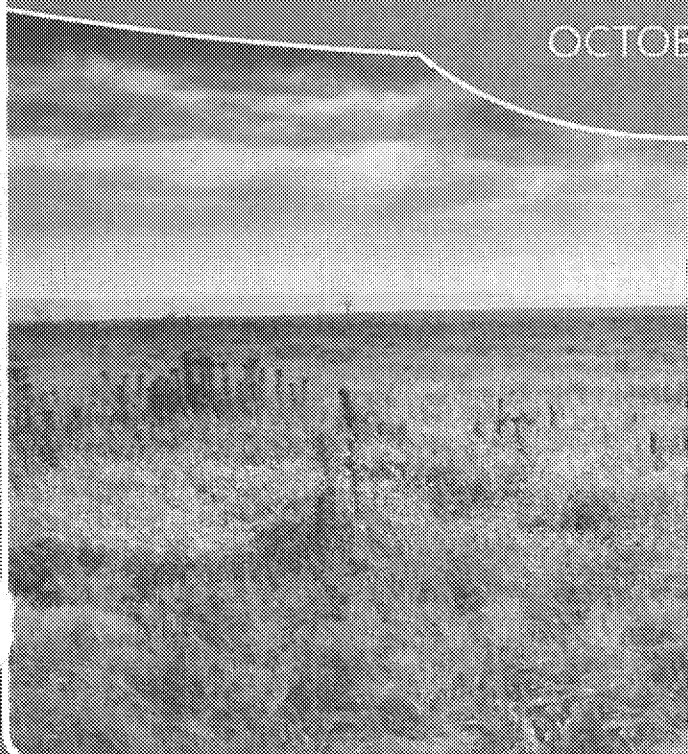


U.S. Environmental Protection Agency | National Tribal Caucus

# COOPERATIVE FEDERALISM

Protecting Human Health and the Environment in  
Indian Country

OCTOBER 2017



## COOPERATIVE FEDERALISM

### Protecting Human Health and the Environment in Indian Country

## Background

The U.S. Constitution, case law, and federal policy have long recognized the sovereign authority and responsibility of tribal governments to manage and regulate the environment and resources on tribal lands, while excluding the regulatory authority of state and local governments over tribal lands and resources. Many of these authorities confirm the duty of trust and special government-to-government relationship owed by the federal government to federally recognized Indian tribes. Tribal governments are primarily responsible for implementing tribal priorities, as well as delegable federal programs, should they choose to do so, to protect water, air, land, and other resources in Indian country. Tribal environmental program activities protect human health and the environment within and around Indian country, and like state environmental programs, they depend on the support of EPA.

The federal Indian trust responsibility is a legal obligation of the United States to protect tribal lands, resources, and tribal treaty rights. The Supreme Court has ruled in cases indicating legal and moral obligations to honor this responsibility with American Indian tribes and Alaska Native villages.<sup>1</sup> Furthermore, these responsibilities carry forward to each generation of American Indian and Alaska Native, along with understandings and expectations developed over the entire course of the relationship between the United States and federally recognized tribes.

EPA was one of the first federal agencies to document its acknowledgement of the special status of tribal governments through the adoption of its *Policy for the Administration of Environmental Programs on Indian Reservations* (Indian Policy) in 1984. The policy enunciated EPA's intent "to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands." This approach is consistent with the federal trust responsibility and underscores the importance of government-to-government relationships between EPA and tribes.

EPA's 2011 *Policy on Consultation and Coordination with Indian Tribes* underpins the recognition of tribes as sovereign entities with authority and responsibility over their citizens and acknowledgement that tribal communities are best served when the tribes themselves are encouraged to assume regulatory authority and program management responsibility over their lands. These views remain consistent with a cooperative federalism model of environmental management.

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<sup>1</sup> (*Seminole Nation v. United States*, 1942 and *Cherokee Nation v. Georgia*, 1831)



## COOPERATIVE FEDERALISM

Protecting Human Health and  
the Environment in Indian Country

Principles of the 1984 Indian Policy	Descriptions of the Federal Role and Function
5. <b>Implementing meaningful consultation with tribes</b>	In keeping with its federal trust responsibility, assuring that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect tribal lands and the surrounding environments.
6. <b>Promoting intergovernmental cooperation</b>	Encouraging cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern
7. <b>Engaging with federal partners</b>	Enlisting other federal agencies that have related responsibilities to support in cooperative efforts that help tribes assume environmental program responsibilities for tribal lands
8. <b>Ensuring compliance</b>	Working cooperatively with tribal governments to assure compliance with environmental statutes and regulations
9. <b>Implementing the principles of the Indian Policy</b>	Incorporating the above principles into EPA's planning and management activities, including budget, operating guidance, legislative initiatives, management accountability system, and ongoing policy and regulation development processes

## Part II: The Implementation of Cooperative Federalism in Indian Country

Since 1984, EPA has taken progressive steps to implement the Indian Policy and its guiding principles. EPA and tribes can strive to protect tribal communities and the environments on tribal lands under a cooperative federalism model in Indian country. Table 2 describes key implementation objectives that indicate policy areas requiring focus as a cooperative federalism approach is undertaken.

## COOPERATIVE FEDERALISM

### Protecting Human Health and the Environment in Indian Country

Cooperative Federalism Implementation Objectives	Policy Areas That Will Require Focus
<b>Support all tribal communities to build and improve sustainable programs</b>	Tribal communities continue to experience significant disparities with respect to human health and environmental and economic conditions. Decreasing the continued disparity between states and tribes would support tribal communities to build and improve sustainable programs.
<b>Use Traditional Ecological Knowledge (TEK) as a guiding resource for increasingly complex environmental realities</b>	Tribes and Alaska Native villages have resided on their lands and surrounding areas for centuries, passing along knowledge through generations. TEK is shared wisdom about the local environment. Each tribe and village has this knowledge about their lands and surrounding areas, and they use TEK to respond to climate change. The Nonpoint Source Program is an example of how TEK could benefit an environmental program.

## Conclusion

The NTC looks forward to working with EPA to preserve the integrity of tribal environmental programs. Through the guiding principles of the Indian Policy, and effective implementation of those principles, a cooperative federalism approach will harbor government-to-government relationships that protect human health and the environment.

# COOPERATIVE FEDERALISM 2.0:

## Achieving and Maintaining a Clean Environment and Protecting Public Health

JUNE 2017



ECOS

### Introduction

The Environmental Council of the States (ECOS) is the national nonprofit, nonpartisan association of state and territorial environmental agency leaders. Its purpose is to improve the capability of state environmental agencies and their leaders to protect and improve human health and the environment of our nation.

The following document was produced through a consensus-based process among the members of ECOS. It is respectfully shared by ECOS with all who desire to participate in a conversation related to these matters. Please feel free to direct questions or comments to ECOS Executive Director and General Counsel Alexandra Dunn at [adunn@ecos.org](mailto:adunn@ecos.org) or 202.266.4929, or to any of the undersigned officers.

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## Part I: Principles of the Roles and Functions of States and U.S. EPA in Cooperative Federalism

	Principles of the States' Role and Function in Cooperative Federalism	Principles of the Federal Role and Function in Cooperative Federalism
1	States should be engaged, as key partners with the federal government, in the development of national minimum standards to protect human health and the environment, and in any federal requirements regarding implementation of those standards. States bring experience in identifying and understanding evolving science and emerging environmental challenges, and in developing effective programmatic options and alternatives. In particular, states have first-hand knowledge of how to ensure successful implementation of programs designed to meet these standards including experience communicating with the regulated community and the public.	U.S. EPA should continue to lead in setting and adopting national minimum standards to protect public health and the environment.
2	States are the preferred implementing entities for national environmental regulatory programs for which federal statutes authorize their delegation. Only where states elect not to pursue delegated federal authority, do not provide the resources necessary to meet national regulatory minimum standards, or have a documented history of failure to make progress toward meeting national standards, should U.S. EPA implement these environmental programs.	U.S. EPA should be the lead implementer of national environmental regulatory programs in those instances where states decline to assume this role, where the states fail to appropriately implement such programs, or where federal statutes establish that role for the federal government.
3	States should have flexibility to determine the best way for their programs to achieve national minimum standards that enables them to incorporate and integrate their unique geophysical, ecological, social, and economic conditions.	U.S. EPA should involve states as partners early and often in developing federal environmental and public health policy, and should specifically seek state and other stakeholder input on the efficacy of new or changed standards or program requirements.
4	States should engage local governments, regulated entities, tribes, and the public, as well as recognize community and equity concerns, in implementation of national environmental regulatory programs, policies, and standards.	U.S. EPA should ensure appropriate federal consultation with Native American tribes in the implementation of federal environmental and public health policies, programs, and standards.
5	States should be the primary enforcement authority for programs delegated to the states and have the ability access federal enforcement authorities when federal enforcement is needed or appropriate.	U.S. EPA should respect the states' role as the primary implementer of national environmental regulatory programs and not review individual state implementation decisions, including enforcement, on a routine or recurring basis unless programmatic audits identify this need or particular circumstances compel federal action.

Those affected by decision should have strongest voice in decisions

## Part II: Changes Implied by Cooperative Federalism 2.0

Our state environmental programs exist to provide the level of environmental and human health protection promised to the American people through our national and state statutes. The key principles articulated above spark the following observations and entreaties for consideration by all parties with an interest in these critical matters. Many of them are buttressed by work underway between U.S. EPA and the states. However, the full embodiment of the principles clearly means a change from business as usual for most states and U.S. EPA and requires a willingness for U.S. EPA and the Congress to align the state/federal relationship with the current realities and responsibilities of state implementation of national regulatory programs. States are willing and eager to engage in this important dialogue.

**A.** Ensuring adequate capital and operating resources to fully implement federal environmental laws has been and must remain a priority focus. Robust cooperative federalism cannot be achieved if one party or the other is not capable of performing its critical functions. Inadequate implementation by states benefits no one; insufficient or non-timely performance by U.S. EPA hurts everyone. Both states and U.S. EPA need to perform as required and expected under a truly effective cooperative federalism. Neither party can, nor should be expected to, perform the important functions needed by the other for each to be successful. For example, adequate capital requirements for clean water (including drinking water) are a crucial public health necessity and a shared responsibility between the federal government, the states, and local governments. The federal government should financially support state implementation efforts commensurate with the complexity and breadth of federal requirements. Furthermore, when states implement federally delegated authorities, they must continue to provide a level of resources commensurate with their responsibilities. In the event there are decreases in the level of support for the operation of federally delegated programs by either federal or state governments, it is critical that there be a shared understanding, and transparency around, what work may no longer be performed by either party.

**B.** With robust engagement of all interests, including states, U.S. EPA should identify key outcomes for implementing federal environmental and public health laws that each federal program, standard, or policy is intended to accomplish. U.S. EPA should seek to demonstrate this through environmental and service delivery (i.e., time) "outcome" metrics rather than "output" metrics. These metrics should be understandable to the regulated community and the public. States should report at regular and consistent intervals to U.S. EPA and the public, through these agreed-upon and, to the extent possible, nationally consistent metrics, what environmental, public health, and service delivery outcomes the state-implemented federal programs, policies, and standards have achieved.

**C.** U.S. EPA and states' working relationships should be continually reviewed, improved, and reformed to conform with the key principles. EPA's oversight of state's performance should emphasize developing, aligning, and mutually supporting efforts that successfully address environmental challenges instead of routinely reviewing state's individual implementation actions. Such cooperative efforts should include development of new regulations and guidance consistent with the key principles, review of past practices and regulations that may be outdated and inefficient (and hence should be modified or eliminated), and determination of how regional and national consistency on implementation can be harmonized with state flexibility and innovation in implementation. There are significant ongoing efforts ready for scale to accomplish this, including E-Enterprise, in which U.S. EPA, states, and tribes jointly identify, manage, and implement projects designed to improve agency performance, implement efficiencies, and reduce burdens on the public and the regulated community. The widespread adoption of business process improvement techniques by states and U.S. EPA shows the benefit of continuing and expanding this effort through adoption of the principles.

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